

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Securities Exchange)
Commission,) Civil Action
) No. 23-cv-1599
Plaintiff,)
) MOTIONS HEARING
vs.)
) Washington, DC
Binance Holdings Limited,) January 22, 2024
et al.,) Time: 10:00 a.m.
)
Defendants.)

TRANSCRIPT OF MOTIONS HEARING
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 THE COURTROOM DEPUTY: Good morning, Your Honor.
2 This is civil action 23-1599, *Securities and Exchange*
3 *Commission versus Binance Holding Limited, et al.* The parties
4 are all present in the courtroom.

5 Starting with the plaintiff, will all speaking
6 counsel please introduce themselves for the record by
7 approaching the lectern.

8 MR. TENREIRO: Thank you. Good morning, Your Honor.
9 I'm Jorge Tenreiro on behalf of plaintiff Securities and
10 Exchange Commission. With me at counsel table are my
11 colleagues Ms. Jennifer Farer, Matthew Scarlato, Emmett Murphy,
12 who will be handling the bulk of the arguments. And also at
13 counsel table are my colleagues Lisa Solomon and Dave Nasse.

14 THE COURT: All right. Good morning.

15 THE COURTROOM DEPUTY: Defense counsel.

16 MR. MENDRO: Good morning, Your Honor. Jason Mendro
17 from Gibson Dunn on behalf of Binance Holdings, Limited, or
18 BHL. I'm going to be speaking to you today, as well as my
19 colleague Matt Gregory. And also with me at counsel table is
20 Dan Nelson.

21 THE COURT: All right. Good morning.

22 MR. DAVIS: Good morning, Your Honor. Dan Davis from
23 Katten Law Firm on behalf of the BAM defendants. With me at
24 counsel table is Gary DeWaal. I'll be speaking on behalf of
25 the BAM defendants.

1 THE COURT: All right. Thank you.

2 MR. QURESHI: Good morning, Your Honor. Abid R.
3 Qureshi of Latham & Watkins on behalf of defendant Mr. Zhou.
4 With me is my colleague Mr. Bill Baker, also from Latham &
5 Watkins.

6 THE COURT: All right. Good morning. I want to say
7 at the start, that I appreciate the quality and the clarity of
8 all of the briefing, including the submissions by the amici,
9 which I've also reviewed.

10 Given all of that, I'm likely to start right in with
11 questions when you get to the lectern, and we'll just assume
12 that the paragraph you had written or paragraphs you had
13 written to start with were terrific and persuasive.

14 I do want to say, I was a little taken aback by the
15 frequency with which you quoted things I said at the initial
16 TRO hearing in your pleadings. I want to underscore that what
17 I was doing that day was asking questions. I didn't rule on
18 anything, I didn't opine about anything. So there is
19 absolutely no need for anyone to refer back to that and quote
20 me to me again today.

21 These are defendants' motions, so I'm going to start
22 with the defense. I've organized my questions along the lines
23 of the issues that you have identified that you're each going
24 to be addressing, even if it wasn't how I originally had it
25 logically flowing. I've now got it so that you don't have to

1 get up and down.

2 If I give counsel an opportunity to get back up in
3 reply, it's going to be very short and targeted and there won't
4 be a need to repeat what has been said during your primary
5 argument or in-depth -- and probably more than once -- in your
6 papers.

7 So I'm going to start with you, Mr. Mendro.

8 MR. MENDRO: Thank you, Your Honor. Good morning.

9 THE COURT: Good morning. Now, between you and the
10 amici I've received pages and pages about what the law
11 regarding investment contracts should be, what it was under the
12 state blue sky laws before the Securities and Exchange Act
13 passed. I appreciate your argument based on the statutory text
14 and its history that something called an investment contract
15 has to involve some sort of contractual relationship. And all
16 of that was very logical and very forceful.

17 The problem is, whether I agree that that's what the
18 Supreme Court should have said, I don't think that's what it
19 said. *Howey* says an investment contract is, quote, a contract,
20 transaction, or scheme. One of three things. It didn't say a
21 contractual transaction or scheme. So explain to me how your
22 view is consistent with *Howey*.

23 MR. MENDRO: Yes, Your Honor. Thank you. So *Howey*
24 was obviously a case that involved contracts, involved
25 warrantee deeds, contracts for land sales. It involved service

1 contracts. So the starting point for the *Howey* analysis was
2 there was a contract. And what *Howey* explains is why a
3 contract can be an investment contract, that's the standard set
4 forth.

5 THE COURT: That's not what it said.

6 MR. MENDRO: Well, it uses the words "schemes" --

7 THE COURT: Or transaction.

8 MR. MENDRO: -- "or transactions." But it's clear
9 from the context in which the Court is evaluating numerous
10 contracts, that what the Court is explaining is several
11 different contractual obligations can be combined to be an
12 investment contract. That's what the Court means by scheme.

13 THE COURT: So, but if the D.C. Circuit didn't read
14 it that way, so how am I supposed to adhere to the *Banner Fund*
15 formulation, which says an investment contract is anything that
16 investors purchase with, one, an expectation of profits arising
17 from; two, a common enterprise that; three, depends on the
18 efforts of others, and find in your favor on that basis here?
19 I'm bound not only by the Supreme Court, but I'm also bound by
20 my own circuit.

21 MR. MENDRO: Of course you're right about that, Your
22 Honor. I think you're quoting from the *Banner Fund* case. And
23 "anything" was just a figure of speech. The D.C. Circuit has
24 never suggested that you can have an investment contract
25 without an option.

1 The Court is bound by two different things; by the
2 statute, which on its face says investment contract -- so there
3 must be a contract if you're applying the statute -- and you're
4 also bound by the case law.

5 And I think it's curious the SEC cites the *Joiner*
6 case, another Supreme Court decision, for the proposition that
7 an investment contract can exist without a contract. In that
8 case the Supreme Court was reviewing a Fifth Circuit decision
9 that had found that oil leases were not investment contracts
10 because they only conveyed land and nothing more. And then the
11 Supreme Court reversed the Fifth Circuit specifically because
12 it found that there was something more.

13 What it found was an ongoing contractual obligation
14 to drill. And specifically what the Court said is the
15 acceptance of the offer quoted made a contract. That's at page
16 349 of the Supreme Court's decision. The Court went on to say
17 that the purchaser was paying both for a lease and for a
18 development project.

19 So the finding of a contractual obligation in *Joiner*
20 was essentially the Court's decision to reverse the Fifth
21 Circuit. And so I think it's very clear that *Joiner* strongly
22 supports the conclusion that a contract is required.

23 THE COURT: Well, it doesn't seem like the Southern
24 District of New York buys your theory either. In *Telegram* the
25 Court talked about a "scheme or a contract," and it noted that

1 the use of the word was not nefarious. We're not saying
2 schemes are bad, it's just meant to be a broad term for the set
3 of expectations surrounding a transaction. Most courts in that
4 district have specifically ruled that *Howey* controls,
5 notwithstanding prior state blue sky decisions.

6 So notwithstanding the fact that you guys keep
7 telling me the same thing over and over again, has any court
8 expressly adopted your position?

9 MR. MENDRO: Well, I think that position is inherent
10 in the *Joiner* decision, and I think several of the circuit
11 court decisions it cites for that proposition too, including
12 the *Rodriguez* case from the First Circuit. That's a case that
13 was favorably cited by the D.C. Circuit in *Life Partners*,
14 *De Luz* by the Ninth Circuit, *Woodward* by the Tenth Circuit.

15 COURT REPORTER: Sorry, could you just slow down on
16 the cases, please?

17 MR. MENDRO: I apologize. I'll slow down.

18 *De Luz*, D-E L-U-Z, from the Ninth Circuit, and
19 *Woodward* from the Tenth Circuit, those are all cases where the
20 court was looking for contractual terms to find that there was
21 an investment contract and rejected the proposition that you
22 can have an investment contract based on something other than
23 those terms.

24 Then, of course, the blue sky laws support the same
25 proposition, Your Honor. The cases cited in *Howey* were cases

1 that involved contracts. In *SEC versus Edwards*, another
2 Supreme Court case, the court handled an argument where the
3 defendant was arguing the contractual entitlement to a return
4 means that there's no investment contract. And Justice
5 O'Connor's majority opinion emphasized, "We are considering
6 investment contracts." She put italics on the word "contract."
7 So the word "contract" matters, and the fact --

8 THE COURT: She put italics around it because it's
9 the word in the statute. But that case, the question in that
10 case was whether a money-making scheme -- and they use the word
11 "scheme" often -- was excluded from the term "investment
12 contract" simply because the scheme offered a contractual
13 entitlement to a fixed return, as opposed to a variable return.
14 And they said it doesn't have to be fixed. That's all they
15 decided. So why are you pointing to that as something that
16 narrowed *Howey* in some way or really addressed this issue in
17 any way?

18 MR. MENDRO: Well, you're quite right. That's what
19 the court decided. I was just pointing out that the court
20 emphasized the statutory language requiring a contract. The
21 court pays attention to that language. And the fact is that
22 every single Supreme Court case and every single circuit case
23 that I'm aware of has found an investment contract only on
24 facts where there actually was a contract.

25 The Court mentioned a moment ago some cases from the

1 Southern District of New York, which I agree they're not all
2 consistent with our argument, but they're not binding on this
3 Court. In the *Telegram* case there actually was an investment
4 contract with lock-up provisions. So, a written contract.

5 So, the facts of these cases are consistent with the
6 statutory text requiring a contract. The courts are looking
7 for offer, acceptance, consideration and some sort of privity
8 between parties that represents a meeting of the mind creating
9 obligations. That's what exists in all the cases where circuit
10 courts and the Supreme Court --

11 THE COURT: Are you saying the *Telegram* case, the *Kik*
12 *Interactive* case, all the cases from the Southern District that
13 seem to have dealt with this more than our district are wrong?
14 Because you have said that an investment contract requires an
15 obligation -- as opposed to an expectation of future activity
16 on the part of the issuer or on the part of another -- that's
17 got to generate returns. And they have said, over and over
18 again, we don't think so when *Howey* doesn't say that. So are
19 they wrong?

20 MR. MENDRO: I would submit, Your Honor, they are
21 wrong to the extent that their holding an investment contract
22 does not require a contract. *Kik*, the case that you just
23 mentioned, also involved an investment contract with lock-up
24 provisions.

25 So the facts are there. Those cases are also not

1 subject to the D.C. Circuit's holding in *Life Partners*, which
2 makes very clear that there has to be post-sale obligations on
3 the part of the promoter of an investment. So those same cases
4 have said that's not required, and in this circuit they can't
5 rely on that.

6 THE COURT: But did *Life Partners* say there has to be
7 a contract, or they're just obligation?

8 MR. MENDRO: Well, in *Life Partners*, again, there
9 were contracts. And it's sometimes difficult to find precedent
10 to support truisms that an investment contract requires a
11 contract. But to answer your question, these specifically
12 speak in terms of --

13 THE COURT: You're being a little too cute to say,
14 well, it's true that an investment contract means contract.
15 That is a natural proposition that I would tend to agree with
16 you on if court after court after court had -- why did they
17 bother to define it as something broader than a contract if
18 it's just a contract? Like they said over and over again,
19 that's not what the court has to say.

20 MR. MENDRO: Well, I think that the right way to
21 understand those opinions is there are opinions that explain
22 when the contract is an investment contract. I don't think
23 there is any case -- with the possible exception of some of the
24 SDNY cases referred to -- that suggest the contractual
25 obligations are not necessary. And to answer your question

1 about *Life Partners* --

2 THE COURT: You don't think the *Banner Fund* language
3 says that?

4 MR. MENDRO: I don't, Your Honor. I think what the
5 Court's saying -- that was another case that involved
6 contracts. There were investors that were investing into an
7 investment fund that was going to be used to generate returns
8 from arbitrage, so there was very clearly a contract. I think
9 what the Court's saying, "anything," it was a figure of speech.

10 THE COURT: Okay. What about the language that's not
11 a figure of speech? How do I square the arguments that you and
12 the amici are making regarding not using an ill-fitting, vague
13 mechanism, like an investment contract, to embark on the
14 regulation of this whole new industry without a clear
15 Congressional mandate, with case law that says over and over
16 and over again the statute was designed to be broad, it's
17 designed to be flexible, it's designed to protect the investing
18 public. It's designed to reach new types of transactions and
19 assets not necessarily contemplated back in the '30s. And all
20 of the cases we talked about say that over and over again as
21 well.

22 MR. MENDRO: Again, I don't think that there are any
23 cases from the circuit courts or the Supreme Court that say
24 investment contract does not require a contract. But I do
25 agree that they say the securities laws are intended to be

1 broad. I'm not disputing that. But the statute has another
2 purpose other than to be broad, it has a purpose to have a
3 limiting distinction between securities and commodities. That
4 distinction keeps real estate from being a security.

5 That same distinction defines both the authority of
6 the SEC, as opposed to the CFTC, and the scope of private
7 securities litigation. If there was no distinction between
8 securities and commodities, we would have class actions by
9 private plaintiffs saying that everything is a security. And
10 the point of the statute is to prevent that by drawing a
11 distinction that's meaningful.

12 There is no court, certainly outside of the SDNY,
13 that has said that a contract isn't required.

14 THE COURT: All right. Well, there was another
15 lawyer who said securities versus commodities and the scope of
16 the authority of the two agencies was going to be his issue.

17 MR. MENDRO: Yes. And that's going to be Mr. Davis,
18 who's counsel for BAM.

19 THE COURT: Otherwise, I'd have to reorganize all of
20 my questions.

21 Let's say I reject your theory that *Howey* does not
22 apply without a contract and I have to go ahead and apply its
23 three-part test. I would like to do that for each of the
24 alleged securities here.

25 So I want to talk about BNB first. And I guess my

1 first question is: Did the assets have any inherent value when
2 they were issued? Could they be used as digital currency?

3 MR. MENDRO: At the time they were issued it could be
4 used as currency, and that's true now.

5 THE COURT: Now, did the value remain static from the
6 time it was first issued until now?

7 MR. MENDRO: No. The value has changed.

8 THE COURT: It went up and down or just up?

9 MR. MENDRO: It has gone up and down and it has not
10 always gone up and down for the fortunes of our client, BHL.

11 THE COURT: So what would you attribute it to?

12 MR. MENDRO: I think it's probably supply and demand.
13 It's hard to know exactly what drives the price of any asset.
14 But BNB is an asset, and my opinion of an asset, it's a thing
15 of value and goes up with equal desire and power.

16 So it could be desirable because others create use
17 cases for it. It could be desirable because people decide they
18 want to invest in crypto currencies. But with respect to
19 resales of BNB -- and I'll just -- I'll note for the court I
20 think this is probably clear from the papers, we have a
21 different --

22 THE COURT: I'm going to get to resale. Right now
23 I'm just talking about the offering itself.

24 MR. MENDRO: Okay. The --

25 THE COURT: Go ahead.

1 MR. MENDRO: Well, to answer your question very
2 specifically, yes, it had value and the value changed. It's
3 hard for me to know exactly what causes the value to change,
4 but I suspect with most assets -- it is an asset, not a
5 contract, not a relationship, not an arrangement. Doesn't have
6 post-sale obligations.

7 THE COURT: I understand the contract argument, it's
8 a legal argument. I might agree with you. But if I don't
9 agree with you, we're going to be wasting a lot of time if we
10 go through the *Howey* factors with respect to each asset that's
11 been alleged and you tell me again it's not a contract.

12 MR. MENDRO: Understood, Your Honor.

13 THE COURT: I hear it, I appreciate it, I understand
14 it. The fact that am asking you questions doesn't mean I also
15 don't also have questions for the government. But I don't need
16 that point underscored while we're talking about something
17 else.

18 MR. MENDRO: Yes, Your Honor.

19 THE COURT: So am I correct that among other reasons,
20 you dispute that the coins meet the definition of an investment
21 contract, a *Howey* definition, if it applies, because increased
22 value and returns are a factor of market forces and not
23 promoter activity?

24 MR. MENDRO: That's correct, Your Honor. That's not
25 the only reason, but yes. Another reason is -- when we're

1 talking about resales, there's no investment in the common
2 enterprise, which is why the essential --

3 THE COURT: I'm going to talk about resale separately
4 because the answer may be different as to the initially and the
5 resale, so I would like to talk about resale separately.

6 So do you dispute the SEC's allegation that how
7 Binance was managed, how it created and supported its platform,
8 its entrepreneurial and managerial activities were supposed to
9 establish or enhance the value in? Do you dispute that?

10 MR. MENDRO: Well, I think the part that I -- I don't
11 dispute where there's entrepreneurial activity for the
12 exchange. But I very much dispute there's any post-sale
13 entrepreneurial activity related to BNB. What the SEC is
14 alleging, is that the company sells an asset, then uses some of
15 the proceeds of that asset to invest back in its business,
16 which the investor doesn't own any share of, and then maybe
17 those investments will cause the business to succeed, and
18 perhaps if the business succeeds, the asset it sold will go up
19 in value too.

20 The same point can be made about any company that
21 sells a durable good. Anything that's sold will generate
22 proceeds for the seller. The seller can invest in its
23 business, which might cause the asset to go up in value. And
24 that can't be enough to make something a security because
25 otherwise all collectibles would be securities, baseball

1 cards --

2 THE COURT: Why were consumers being encouraged to
3 purchase BNB, as opposed to any other coin? What was all that
4 stuff that Binance was saying in its white paper and its public
5 statements over and over again for, if it didn't want the
6 investing public to think that the reason you want this coin,
7 the reason you want to give us your money is because we're
8 going to make this platform so much better, so much stronger,
9 that these coins are going to retain their value while the
10 other ones stall out?

11 MR. MENDRO: Undoubtedly, anybody who sells any
12 assets wants to be successful. But that's not the definition
13 of a security. Why would they advertise it? Because otherwise
14 the enterprise, the exchange enterprise would be a failure.
15 But I think --

16 THE COURT: You're saying it's just puffery? It's
17 just hype? It's not really true? All the platforms are
18 equally good?

19 MR. MENDRO: That's not what I'm saying, Your Honor.
20 I'm saying that advertising a platform is something that you
21 would expect anybody who creates an annuity to do and it
22 doesn't define a security.

23 One thing I want to be clear about, because I think
24 it can get lost in the papers, in a lot of the SDNY cases the
25 asset was being issued at the time that the company was

1 developing a blockchain and that's the only place that that
2 asset could live. Here the blockchain is not made by BHL, the
3 blockchain is -- the etherial blockchain existed before BHL.
4 What BHL was creating, this exchange, which is a meeting place,
5 like eBay, where people who want to buy and sell things can
6 come together to conduct transactions.

7 But BNB very much exists outside the exchange. It
8 will trade on this blockchain if BHL goes away. It can trade
9 on other people's exchanges. So this isn't a case where the
10 asset had no existence outside of what BHL was building, which
11 is just an exchange, not a blockchain.

12 THE COURT: Do you dispute the fact that they were
13 really touting the strength of the exchange and, indeed, using
14 these funds to create and strengthen the exchange as a reason
15 investors should buy these particular coins?

16 MR. MENDRO: I will not dispute that they were
17 touting the exchange and their plans, with good reason. They
18 had good management, they wanted people to know that, they
19 wanted people to buy their asset. But, you know, Topps wants
20 people to buy their baseball cards and also receive the
21 proceeds and uses them to create an environment where people
22 might want more baseball cards.

23 THE COURT: I don't think that's part of the
24 advertising, actually, for baseball cards that -- but anyway, I
25 don't know if that's your world's greatest analogy.

1 All right. I don't think the government or any case
2 has said a digital coin is always a security. The case law
3 seems to focus on the totality of the circumstances. How is it
4 sold? How is it marketed? What were the reasonable
5 expectations for a return? Were the fortunes tied to the
6 fortunes of the issuer? Why does that not apply to the BNB
7 ICO.

8 MR. MENDRO: So for the BNB ICO, Your Honor, we're
9 relying on extraterritorial arguments and we're relying on
10 statute of limitations arguments, which Mr. Gregory is going to
11 address.

12 THE COURT: Let's say we're just talking about the
13 question I just asked you, which is which element of the *Howey*
14 test fails with respect to the BNB ICO?

15 MR. MENDRO: The element requiring post-sale
16 obligations on the part of the promoter.

17 And the reason for that is --

18 THE COURT: Where is that one of the three *Howey*
19 elements?

20 MR. MENDRO: It's from *Life Partners*, Your Honor.
21 The reason for that is that the proceeds are not being used --
22 the investment proceeds are not being used to generate a return
23 for the investor after the investment is made. The proceeds
24 are just going to BHL, which BHL is using as it pleases to
25 develop its exchange, but its exchange is separate.

1 But I do want to be very clear, in our brief, that
2 we're not relying on *Howey* for the ICO. We're relying on time
3 bar, we're relying on extraterritorial. I'm trying to be
4 responsive to the Court's questions.

5 THE COURT: That's fine.

6 MR. MENDRO: This isn't a point that we concede. And
7 it is a point we would vigorously argue if this case proceeded.
8 But in this stage we wanted to give you the clearest way to
9 dismiss. And I submit, and our briefs argue, the clearest way
10 to dismiss the ICO is time-barred and extraterritoriality.

11 THE COURT: I forget, are those your arguments?

12 MR. MENDRO: That's going to be my colleague.

13 THE COURT: Putting aside then the argument that you
14 have to have a contract and it's not fair, why is the SEC wrong
15 about BUSD and whether the sale of that was an investment
16 contract?

17 MR. MENDRO: If I could, Your Honor, just make one
18 closing point. I know you want to get to resales later. But
19 it was the thrust of what we argued in our brief about BNB. So
20 I want to make this brief.

21 THE COURT: Okay.

22 MR. MENDRO: With respect to the resales of BNB,
23 customers aren't paying BHL anything. They're just paying
24 whatever happens to be selling when they happen to be buying.

25 THE COURT: It's the investment of money aspect?

1 MR. MENDRO: It's the investment of money. It's a
2 common enterprise. If there's no investment of money, it's a
3 common enterprise. Under *Life Partners*, to have that, you have
4 to have a pool of assets which share profits and share risks.
5 And you have no pooling of assets when a buyer is simply paying
6 the seller. That's what happens over an exchange.

7 So that, we would submit, Your Honor, is a very
8 simple way to dismiss all of the SEC's claims about BNB
9 regarding resales over the exchange.

10 THE COURT: Okay. One of the cases, I think it was
11 *Telegram*, basically said, in terms of secondary sales, you
12 could be right, or it could depend on what was said about the
13 secondary sales as part of the initial offering. In other
14 words, if there's something that they were -- at the beginning,
15 when they were touting their superior platform when they issued
16 them, could that still be part of the circumstances surrounding
17 secondary sales?

18 It seems to me, in the Second Circuit, also, there's
19 a -- well, not the circuit, in the Southern District of
20 New York there's a split between courts that are saying
21 secondary sales are not ever investment contracts, and some are
22 saying, well, it could be depending on what you said when you
23 sold them. So, which line of authority is correct? Is it
24 never an investment contract once it's past -- once it's been
25 sold the first time? Or does it depend on the circumstances?

1 And then are there circumstances alleged here that could
2 plausibly allege, in even the secondary sale, was an investment
3 contract?

4 MR. MENDRO: So there's a couple questions there and
5 I'll try to take them in turn.

6 THE COURT: You wanted to skip ahead to secondary
7 sales, so I don't want to miss anything.

8 MR. MENDRO: With regard to secondary sale, you can
9 never satisfy -- of an asset that's not a contract, you can
10 never satisfy the prong that requires there to be an investment
11 of money in a common enterprise because the money is a pool --
12 will the Court mind if I grab a drink of water?

13 THE COURT: Go right ahead. It does not count as a
14 phone.

15 MR. MENDRO: Thank you, Your Honor. There will never
16 be pooling of assets in that circumstance, so it doesn't really
17 matter what was said at the beginning, you know, at the outset
18 of the launch of the offering.

19 I think you're referring to two recent cases from the
20 SDNY, one is the *Ripple* case, and that's the case that makes
21 the point that people who are buying tokens on the secondary
22 market don't even know the seller.

23 THE COURT: Right. I think it found they were
24 generally excluded from the notion of an investment contract.
25 But I think the *Terraform Labs* case said there were some

1 circumstances where there could be. So I want to know which
2 one is more similar to what we have here in terms of the
3 allegations and whether one of them was wrong, in your view.

4 MR. MENDRO: Exactly, Your Honor. That's the split.
5 So it's in the SDNY.

6 We obviously agree with the *Ripple* decision. The
7 *Terraform* decision says that secondary sales can be investment
8 contracts because the proceeds of those sales feed back into
9 the blockchain. That was the reasoning. That can't -- with
10 respect to the Court, that cannot be right. The proceeds of
11 those sales go to the seller. And in this case the
12 blockchain -- this isn't even BHL's blockchain, it's the
13 etherial blockchain, which predates BHL.

14 So we think that reasoning is not correct. We also
15 submit the allegations here wouldn't support that there's no
16 allegation that somebody who buys BNB, or any of the
17 third-party tokens, by the way, would have very similar
18 arguments for them. There's no argument that the proceeds of
19 those sales would go back to BHL or go back to the creators.
20 So, no, you can't have an investment contract in this
21 circumstance.

22 We're not asking the Court to hold that there's no
23 circumstance in which an investment contract could be resold.
24 I don't think we need to go that far on the allegations of this
25 case. And I can imagine, you know, there may be some

1 circumstance where there's a contract that has rights of
2 assignment, or maybe promoter of that contract agrees to an
3 assignment with a third party. You could come up with a
4 hypothetical where I would be very hard-pressed to say that
5 that doesn't remain an investment contract.

6 But those circumstances aren't here. These
7 circumstances are completely consistent with the transfer of
8 assets, which don't come with any kind of obligations and which
9 don't result in any pooling of assets.

10 THE COURT: Okay. Let's go back, because I do want
11 to touch on -- I want to be careful to make sure that I ask
12 each side about each asset that's at issue here. Talk to me
13 about BUSD and why the SEC is wrong about it when they
14 characterize it as an investment contract.

15 MR. MENDRO: In the case of BUSD, the problem is
16 there isn't a credible argument for the customer to expect a
17 profit. BUSD is what's called a stable coin. So its value is
18 fixed upon dollar, and it always remains fixed upon dollar. So
19 there's no reasonable expectation of profits. And with regard
20 to reselling of BUSD on the secondary market --

21 THE COURT REPORTER: Sorry. Could you repeat that?

22 MR. MENDRO: With regard to resales of BUSD on the
23 secondary market, there's also, again, not an argument the
24 money was pooled. I believe the SEC would say and it's
25 alleging BUSD in the U.S. was sold directly and over the

1 exchange.

2 So the principle argument is that customers cannot
3 expect a profit, which obviously is an essential element of the
4 *Howey* test.

5 THE COURT: Going back to BNB for a minute, one of
6 the Southern District opinions made kind of a careful
7 differentiation based on who are you selling it to. Just going
8 out to the investment public, what's reasonable for people to
9 anticipate might be different than if you're doing
10 institutional sales or you're going after sophisticated
11 investors that are actually reading your white papers and all
12 of those things. Do you think that there should be a
13 differentiation in the analysis based on who a particular asset
14 is being marketed to?

15 MR. MENDRO: That analysis also comes from the *Ripple*
16 case. And I do believe that is a very relevant consideration,
17 Your Honor. For one reason, it shows privity. The seller and
18 the buyer are talking to each other, they know that the money
19 is going to the buyer, the buyer knows the money is going to be
20 used to promote the platform. That's very different than when
21 a personal market happens over an exchange. So I would agree
22 that's a relevant consideration.

23 THE COURT: I don't think they meant privy in a
24 contractual sense. I think they meant who is smart enough to
25 be paying attention to your documents and who is going to

1 bother to pay attention to your documents. But, yes, I
2 thought -- it's a very thorough, well thought-through opinion.
3 I mean, a lot of them are. But they don't all come out the
4 same way.

5 All right. They have also alleged that the simple
6 earn and the BNB vault programs are also investment contracts.
7 What do you have to say about each of those?

8 MR. MENDRO: There, Your Honor, so those are two
9 pages of allegations in a 134-page complaint with 500
10 paragraphs or more.

11 THE COURT: I noticed that.

12 MR. MENDRO: Yeah. So I think the allegations are
13 quite conclusory. We submit that those two programs are not
14 investment contracts because it's undisputed. I think the SEC
15 would agree that the investment could be withdrawn at any time.

16 THE COURT: Slow down, because now even I can't keep
17 up with you.

18 MR. MENDRO: The funds can be withdrawn at any time.

19 THE COURT: Okay.

20 MR. MENDRO: The complaint describes them as loans at
21 paragraph 327, 329, and 331. And there's no investment of
22 money under *Howey*, customers don't transfer anything, no
23 ownership is transferred. And the *Daniel* case, the Supreme
24 Court case, *Teamsters versus Daniel*, the Court said that
25 ordinarily the investor has to give up specific consideration.

1 Whereas here, the allegations are not consistent with giving up
2 consideration. They're more consistent with simply making a
3 deposit that can be gotten back at any time.

4 The other answer to Your Honor's question about why
5 the Simple Earn and BNB vault claim fails, this is Count 3, is
6 both of those programs are extraterritorial. And Mr. Gregory
7 will address that.

8 THE COURT: Okay. And then you've taken on the
9 third-party tokens as one of your issues. You've already
10 touched on it to a certain extent. But if you have anything
11 else, any other reason why I should reject the notion that
12 those are being sold as investment contracts?

13 MR. MENDRO: The argument for those third-party
14 tokens, Your Honor, are very similar to the resale argument for
15 BNB. There's no pooling of assets because the money simply
16 goes from the buyer to the seller. There are no post-sale
17 obligations to do anything for anyone. So we would submit that
18 the Court should dismiss the claim about the third-party coins
19 for the same reason that the Court should dismiss the resale
20 claims for BNB.

21 THE COURT: Do you want to direct me to the specific
22 page and language in *Life Partners* that says there must be
23 post-sale obligations in this circuit?

24 MR. MENDRO: Yes, I would be happy to do that. Bear
25 with me one moment, I'll grab a case.

1 THE COURT: That's fine.

2 (Pause.)

3 MR. MENDRO: Sorry, Your Honor.

4 Page 545, Your Honor. This was a case, the entire
5 basis for the reasoning in the case, this was a case where the
6 defendant was selling an interest in viatical settlements and
7 the Court -- they were clearly an investment. There was no
8 dispute that the only reason to buy this was to make money.
9 And the Court concluded that the requirement of *Howey* that says
10 that you have to have reasonable expectation of profits in the
11 endeavors of another was not satisfied because the return on
12 the viatical settlements was entirely based on the insured
13 passing away. So the Court said there was no meaningful
14 entrepreneurial managerial efforts that the defendant LPI made.

15 THE COURT: Right. That's different from obligations
16 or contractual the way you've been reading it. It was saying
17 that there's just nothing to do at all. You were not doing
18 anything managerial or entrepreneurially that would affect the
19 value. The value was determined by when the person died.

20 MR. MENDRO: That's right, Your Honor.

21 THE COURT: Okay. Just want to make sure I didn't
22 miss something in there.

23 MR. MENDRO: No, you didn't. But the Court does
24 speak in terms of commitment, that's also on page 545. It's
25 looking at the commitments made by the defendant, the promoter

1 of the investment, to engage in managerial or entrepreneurial
2 activities to earn a return from the investor's investment
3 after that investment is made.

4 THE COURT: And with respect to BNB, you're not
5 disputing that there are allegations in the complaint -- which
6 is where we are right now, not proved -- that Binance was
7 saying we're going to do all these things to support our
8 exchange and all those things are going to support the value of
9 BNB, which you're relying on the time-barred and
10 extraterritoriality and the fact that there was no contract to
11 do that?

12 MR. MENDRO: For the ICO, that's true.

13 THE COURT: Right.

14 MR. MENDRO: But for the resales, we would also
15 submit there's no obligation --

16 THE COURT: Right. I heard all that and I even took
17 notes. So, I was planning to ask you about this question last,
18 but since it's assigned to you, I want to ask you a few more
19 questions before I go on to Mr. Gregory's issues, which I'm
20 also interested in.

21 But you have taken on the major questions doctrine.
22 And I have to say that while this may be a trillion dollar
23 industry, I'm not inclined to think it qualifies under the very
24 narrow circumstances outlined in these cases. So is there
25 anything you want to add to what's in your brief with respect

1 to the major questions doctrine?

2 MR. MENDRO: There is one thing I would like to add
3 to my last answer, if the Court would indulge me.

4 THE COURT: Okay.

5 MR. MENDRO: I would also point the Court to page 548
6 of *Life Partners*.

7 THE COURT: Okay.

8 MR. MENDRO: Where the court says: For present
9 purposes we need only agree with the district court that
10 pre-purchase services cannot by themselves suffice to make the
11 profits of an investment arise predominantly from the efforts
12 of others. That's --

13 THE COURT: Right. And it repeated that in the
14 denial of the rehearing, that that's all it was saying, the
15 pre-purchase activities alone weren't enough, there had to be
16 activities later.

17 MR. MENDRO: Right, that were managerial and
18 entrepreneurial in the sense they generated returns for the
19 investor.

20 THE COURT: Okay.

21 MR. MENDRO: So on -- I just wanted to make sure I
22 gave you that quote too, since you asked me for a page number.

23 THE COURT: All right.

24 MR. MENDRO: The major questions, it's obviously a
25 multi-trillion dollar industry. The complaint alleges, at

1 paragraph 102, that BHL alone had \$9.5 trillion in trading
2 volume by 2021. But that's not the only reason. It's also an
3 issue of enormous political significance, which is another
4 factor for the major questions doctrine. The regulation of the
5 crypto market has been the source of fierce public debate.
6 There have already been more than 20 proposals to enact laws
7 governing the industry.

8 And I would further submit that if the Court does
9 what the SEC is asking and it concludes that an investment
10 contract doesn't require a contract, this case becomes even
11 more major for purposes of the major questions doctrine because
12 it would mean that the SEC's authority to stretch to cover
13 virtually any asset that someone might hold that goes up and
14 down in value. The SEC essentially would become the investment
15 exchange reach because there would be no distinction between
16 commodities and security that could be understood.

17 THE COURT: You keep saying that, but that's like
18 saying there would be no difference between orange groves and
19 securities. Every single one of these cases says, over and
20 over again, that there's a difference between the asset and the
21 investment contract to sell the asset, or the contract scheme
22 or transaction and the set of expectations and agreements
23 surrounding it that constitutes the transaction. No one is
24 saying, not even the SEC, that every single digital coin is a
25 security, are they? Are they asking me to find that?

1 Everybody is all up in arms about that, but I don't see where
2 anybody is asking me to do that.

3 MR. MENDRO: I think it's a very fair question for
4 the SEC, Your Honor. I mean, just last fall the chairman of
5 the SEC was unable to answer the question whether a digitized
6 Pokémon card was a security. And so the problem is, the line
7 is very unclear.

8 THE COURT: Well, the last time you all were up in
9 front of me you weren't able to answer the question of whether
10 it was a commodity and now you're all excited about it being a
11 commodity. So people's positions change, even though the law
12 hasn't.

13 MR. MENDRO: There certainly has -- we thought much
14 more about the issue since we came here for an emergency motion
15 almost -- nearly a year ago. But the reason I'm emphasizing
16 the consequences of the SEC's position is because the *Merck*
17 case, which is a D.C. Circuit case, also binding on this court,
18 makes clear that even if you have a rule that in any particular
19 context is not offensive or difficult to comply with it, you
20 have to look at the further implications of what the agency is
21 asking for.

22 THE COURT: But I think the major questions doctrine
23 isn't just saying will this affect the industry in its
24 entirety, it's suggesting: Will that affect the economy of the
25 United States in its entirety? Is that industry such a

1 fundamental part of how people operate in this country? And
2 while the digital coin investments have been popular, they're
3 hardly driving our economy at this point, are they?

4 MR. MENDRO: I don't know that it's in the record as
5 to whether -- what extent they're driving the economy, but it
6 is in the record that we're talking about trillions of dollars,
7 which is much, much more than what's at stake in many cases the
8 Supreme Court decided did implicate the major questions
9 doctrine.

10 So would you think that doctrine applies? We do
11 think that's a separate, independent reason why the Court
12 should dismiss. And it's very clear that there is no express
13 congressional authority for the SEC to be regulating the crypto
14 currency market.

15 THE COURT: Well, there's no express authority for it
16 to regulate any of the things that courts have held were being
17 sold as investment contracts.

18 MR. MENDRO: Well, to the extent that they actually
19 are contracts, the SEC has a better argument that they're
20 within the statutory authority. I think if the Securities Act
21 and the Securities Exchange Act said the SEC has the ability to
22 regulate anything that somebody might buy for investment
23 purposes, or even principally for investment purposes, I would
24 have a harder argument to make. But when the SEC argues an
25 investment contract doesn't require a contract, and the

1 consequence is that basically anything that's tokenized or
2 digital could be within its reach, there is a major question.

3 THE COURT: All right. Okay. Thank you.

4 MR. MENDRO: Thank you, Your Honor.

5 THE COURT: Is there anything you want to add on any
6 of the points that you were assigned to that you haven't gotten
7 to say before I turn to the next counts?

8 MR. MENDRO: Not at this point, Your Honor. But with
9 the Court's indulgence, I would like to reserve the opportunity
10 for rebuttal.

11 THE COURT: It will be short.

12 MR. MENDRO: Thank you.

13 THE COURT: Okay. Mr. Gregory.

14 MR. GREGORY: Thank you, Your Honor.

15 THE COURT: All right. Since we started with major
16 questions, I'm going to start with you with the due process
17 because I wasn't sure I found that one all that persuasive
18 either. But, I want to know why I'm wrong about that.

19 So if you want to do more than just rest on your
20 pleadings with that, you can tell me. But we've got a DAO
21 report in July of 2017 in which the SEC found that a German
22 company's marketing of tokens was a sale of securities and it
23 advised people in the industry to start paying attention and
24 comply with the securities laws.

25 It issued its framework about digital assets in 2019,

1 the *Kik Securities* case was filed in 2019, *Ripple Labs* was
2 filed in 2020, *Telegram* around the same time. And the
3 complaint has multiple allegations in which Mr. Zhao is
4 discussing explicitly how to avoid SEC regulation earlier than
5 that. So on what basis are you arguing that nobody was on
6 notice and this just came out of nowhere?

7 MR. GREGORY: Couple of responses, Your Honor.
8 First, everything you just mentioned postdates the July 2017
9 ICO. So even if Your Honor is not buying this argument more
10 broadly, that would still be a reason to dismiss any claims
11 related to the July 2017 offering of BNB tokens. But more
12 broadly, I think the SEC to this day has been talking out of
13 both sides of its mouth when it comes to crypto tokens.
14 They're telling the industry, come in and register, while
15 simultaneously, with their other hand, holding the door closed,
16 preventing any viable path to do that.

17 THE COURT: How are they holding the door closed?
18 There are points where they're not -- not saying the things
19 that they're saying now, but when were they stopping you?

20 MR. GREGORY: You could look at the experience of
21 Coinbase, Your Honor, which tried to go to the SEC and say how
22 can we come in and register as a crypto exchange, given the
23 unique assets of this industry and the particular fact that
24 these tokens are used for transactions, they're not just used
25 solely for investments, like other securities.

1 The SEC refused to cooperate, refused to give them
2 any guidance. In fact, just went ahead and sued Coinbase on
3 the same plot that they're bringing here, while simultaneously
4 telling the public, Come in and register, come in and register,
5 we'll work with you. So I think that's the inherent problem
6 here, Your Honor, is they're simply refusing to give people a
7 viable path in the crypto space.

8 THE COURT: All right. Well, much of the brief has
9 been focused on what I would call loosely "policy arguments."
10 Congress is working on this, SEC has taken contrary positions
11 in the past. And you could certainly have a legitimate
12 discussion about the fairness of using litigation to regulate
13 the crypto currency industry after years of inaction, or
14 whether it makes sense as a policy matter to go token by token,
15 court by court and risk, as we already have gotten some
16 conflicting decisions on different important points. How does
17 any of that bear on a motion to dismiss under Rule 12(b)(6)?

18 MR. GREGORY: It bears on the fair notice argument
19 and here's why: The agency, of course, under *Chaney* has
20 discretion to choose to bring enforcement actions instead of
21 dual rulemaking. But they always have the obligation to
22 provide the public fair notice of the conduct that it expects
23 of them, even if they're using enforcement, and they simply
24 haven't done that here. And so that's where this argument
25 comes in for purposes of the motion to dismiss.

1 THE COURT: Well, after -- yes, pre -- let's say I
2 agree with you pre-2019. But after that, how can you say the
3 public is not aware of what's going on?

4 MR. GREGORY: In 2018 the SEC is telling the public
5 that tokens are not securities. As recently as, I believe,
6 2021 Chair Gensler said there is no regulatory framework for
7 this industry yet. And so it's not just 2017. I mean,
8 throughout this time period they are telling the public things
9 that are completely inconsistent with what they're saying in
10 court now, and they're seeking to apply that new interpretation
11 retroactively in our case. They're saying there's not even a
12 limitations period.

13 THE COURT: What authority do I have to impose any
14 preferences on how an agency should exercise its enforcement
15 authority? I mean, let's say I think regulation is the way to
16 go. What's it matter what I think?

17 MR. GREGORY: For purposes of this motion, Your
18 Honor, it's the Due Process Clause. It's the lack of fair
19 notice. I understand Your Honor has concerns about this
20 argument, but that's where this fits into our motion to
21 dismiss.

22 THE COURT: All right. One of the things you all are
23 doing is saying, Look, there's proposed legislation over here,
24 that's the way for them to go. Are you all supporting the
25 proposed legislation?

1 MR. GREGORY: I'm not aware today of our client's
2 position on any particular legislation. But this gets to the
3 major questions, Your Honor. And of course that's not part of
4 Congress's interest in the question; it has decided that it
5 requires legislation. It doesn't matter whether any particular
6 party is supporting that.

7 THE COURT: All right. Let's get to the legal
8 arguments. Is there anything left to your argument that a U.S.
9 federal court and federal agency don't have subject matter
10 jurisdiction or personal jurisdiction over Binance now that
11 you've conceded jurisdiction in the CFTC case?

12 MR. GREGORY: To be clear, BHL has not moved to
13 dismiss for lack of jurisdiction in this case. Mr. Zhao has,
14 and I believe his counsel will address that issue for him.

15 THE COURT: Okay. What about subject matter
16 jurisdiction? That's one of the arguments I think you're
17 holding onto, aren't you?

18 MR. GREGORY: We are not arguing that the court lacks
19 subject matter jurisdiction.

20 THE COURT: Just under the Extraterritorial Act?

21 MR. GREGORY: We have argued the statute doesn't
22 apply beyond U.S. borders. But the Court in *Morrison* made
23 clear that's not a jurisdictional question, that's simply a
24 statutory interpretation issue.

25 THE COURT: So the government's position is: We're

1 not seeking extraterritorial application of the securities laws
2 just because the buyers are U.S. residents. In fact, they say
3 we're not seeking extraterritorial application at all. These
4 were offers and sales in the United States and they're not
5 exclusively foreign. So what's the response to that?

6 MR. GREGORY: It's simply incorrect under *Morrison*
7 and *Abitron*. So if you read *Abitron*, the Supreme Court was
8 very clear this last June that the defendant's conduct, conduct
9 that's alleged to have violated the statute on which the client
10 had argued the SEC was premising liability, the defendant's
11 conduct has to be what occurred in the United States. Here
12 they pointed to vague allegations about bank accounts, they
13 pointed to consequences in the United States, the presence of
14 U.S. investors, marketing that reached the United States,
15 things of that nature.

16 Under *Morrison*, a decade of post-*Morrison* precedent
17 applying the transaction test, and even more clearly the
18 Supreme Court's decision in *Abitron*, that is simply not enough
19 to show a domestic application, and here's why: It's a tight
20 test and it's supposed to be because otherwise the SEC could
21 bootstrap its ways into foreign countries, get around the
22 *Morrison* assumption against extraterritoriality simply by
23 pointing to any sort of domestic conduct, use vague hooks to
24 get the claim back into the United States. The Supreme Court
25 has warned against this and said you are to be very wary of

1 arguments the SEC is making here when the specific statutory
2 violation by the defendant is not alleged to have occurred in
3 the United States.

4 THE COURT: All right. Well, *Morrison* was dealing
5 with the 10(b) type allegations and the portion of *Banner Fund*
6 that preceded *Morrison* that said the 10(b) was okay because it
7 affected our residents here -- which we know has now been
8 overturned by *Morrison* -- what about the portion of *Banner Fund*
9 that said the failure to register allegations apply here? Is
10 that still good law after *Morrison*, too?

11 MR. GREGORY: No, Your Honor, because *Morrison* makes
12 clear the test here is where the transaction occurred. And all
13 of these statutes that speak of registration use the same
14 transactional language. In fact, the language that is even
15 more clearly referring to transactions than Section 10(b) in
16 *Morrison* and *Morrison* itself discussed the registration
17 provision. So *Morrison* discussed Section 5, drew from Section
18 5 the transactional test that it then put into 10(b) context.
19 So I think *Morrison* makes clear that's just off the table.

20 THE COURT: All right. Let's talk about the
21 limitations argument.

22 I understand that the initial coin offering began in
23 2017, but if Binance continued to sell the same coin
24 thereafter, does that extend the statute of limitations? What
25 is the time boundary that you're talking about here?

1 MR. GREGORY: The SEC specifically alleges in the
2 complaint that the offering, that the direct sales from BHL of
3 BNB tokens ended in early July 2017. Now, if we're talking
4 about resales, we aren't seeking to dismiss those on
5 limitations grounds. But any claims related to the alleged
6 direct sales by BHL, the SEC itself alleges they were over in
7 July 2017 and they haven't asserted any sort of continuing
8 violation or anything like that, they've just simply said the
9 limitations period doesn't apply at all.

10 THE COURT: And why doesn't it apply at all?

11 MR. GREGORY: The SEC's theory, as I understand it,
12 the foreign defendant never gets the benefit of a limitations
13 period, especially a foreign corporate defendant, which, of
14 course, can have physical presence through its employees. The
15 relevant limitations period here include the exceptions for
16 when a defendant is either outside the United States or cannot
17 be found within the United States. Here, at paragraph 24, the
18 SEC specifically alleges that BHL did have employees in the
19 United States.

20 So I think their theory is only the country of
21 corporation that counts. And that would be a pretty bizarre
22 scheme for Congress to adopt, that foreign platforms are
23 somehow subject to the securities laws through their capacious
24 understanding of a domestic violation and get no limitations
25 period at all, even if they have employees in the

1 United States.

2 THE COURT: All right. And is there a specific case
3 that you're relying on that deals with that dichotomy between
4 you can't reach the foreign company so we need more time to get
5 them and then your argument?

6 MR. GREGORY: There are cases, Your Honor. There's
7 not many. We've looked and we found essentially the same cases
8 that the SEC cited you. There's the *Sharp* case from the
9 District of Massachusetts. That case I think pretty clearly
10 says we're talking about physical presence. Now, it involves
11 individuals, not a corporation. And I'm not aware of any case
12 that addresses these facts for a corporation. But I would
13 submit it simply can't be the case that Congress wanted foreign
14 corporate defendants to never have any limitations period, even
15 if they have a presence in the United States.

16 THE COURT: All right. Of the issues assigned to
17 you, is there anything that I haven't asked you about directly
18 that you want to emphasize before we turn to Mr. Davis?

19 MR. GREGORY: A couple things, Your Honor. First, I
20 do want to mention this other argument the SEC raised about the
21 limitations period. They've pointed out the claim for
22 injunctive relief is subject to a longer time period, ten
23 years. That is correct as far as is it goes, but the SEC
24 hasn't alleged requisite facts to seek injunctive relief. We
25 explain that in our brief.

1 I think it's fully addressed in there, but I want to
2 make sure that doesn't get missed in this because I'm sure
3 they'll come up and mention the claim for injunctive relief.
4 The reason is, they have to allege that the violation is
5 essentially ongoing, the statutory language is engaged or about
6 to engage.

7 On extraterritoriality --

8 THE COURT: Does the fact they're relying on that
9 suggest that they are relying on some sort of continuing
10 violation theory?

11 MR. GREGORY: They don't allege it in the complaint,
12 Your Honor. They did say that in the brief. The allegation
13 perhaps would seek the opposite. This is all over in the
14 brief. I think it's far too late for them to bring a new
15 theory up now.

16 One other thing I would like to say on
17 extraterritoriality, Your Honor, is just remember there are
18 other cops on the beat here. The world is not a void waiting
19 to be filled by SEC regulation. Other countries regulate these
20 transactions, other countries regulate conduct that occurs
21 within their own borders. Like *Morrison* --

22 THE COURT REPORTER: Sir.

23 MR. GREGORY: Sorry.

24 THE COURT: Well, wasn't the point that they weren't
25 on any country's beat? Didn't they deliberately not put

1 themselves down anywhere for that very reason? What other
2 countries were on this beat?

3 MR. GREGORY: To be clear, Your Honor, they allege
4 the Cayman Islands. There's not more than that in the
5 complaint. If you want me to go outside the record, I can. We
6 are licensed in multiple jurisdictions. When I say "we," I
7 mean Binance.com, the platform is licensed in more than a dozen
8 locations around the world.

9 But more importantly, under *Morrison* that is not the
10 test. It's not our burden to show a specific country that
11 regulates conduct. *Morrison* and *Abitron* say U.S. law stops at
12 the border and it's up to other countries to decide what
13 happens within their own borders. Again, the world is not just
14 waiting for the SEC to come in and fill a gap.

15 THE COURT: All right.

16 MR. GREGORY: Thank you, Your Honor. And I would
17 also like to reserve just a little bit of time for rebuttal, if
18 I may.

19 THE COURT: All right. We'll see how this goes.

20 Mr. Davis.

21 MR DAVIS: Good morning, Your Honor.

22 THE COURT: Good morning. And without repeating the
23 arguments that I think the initial counsel has made very
24 forcefully about whether you need a contract, just assuming
25 that we're working through a *Howey* analysis, why is the SEC

1 wrong when applying *Howey* to the BAM trading staking program?

2 MR DAVIS: Sure. Two reasons, Your Honor, in
3 addition to the reasons that Mr. Mendro mentioned. First of
4 all is the pooling question. *Life Partners* is clear in this
5 circuit, to establish horizontal commonality you need to
6 establish pooling, and that is not present with the secondary
7 market transactions on BAM's platform. None of the money that
8 it trades hands within those secondary market transactions goes
9 to the issuer. And that's clear in the allegations in the
10 complaint. You can look at paragraph 91, which says the buyers
11 and sellers of the digital assets of BAM's platform do not know
12 each other.

13 Paragraphs 223 and 224, which says the BAM matching
14 engine matches those bids and offers. And 232, 233 where it
15 says the money trading hands is held at a trust company, not
16 anywhere else. So that defeats the *Howey* analysis in the D.C.
17 Circuit because you don't have horizontal commonality because
18 you don't have pooling and that --

19 THE COURT: Well, did *Life Partners* say that pooling
20 was indicative of horizontal commonality or did he say it was
21 necessary?

22 MR DAVIS: He said it was an element. And that
23 phrasing was repeated in the *Banner Fund* case four or five
24 years later, and it -- the *Life Partners* case required pooling
25 because the viatical settlements, the Court was saying, well,

1 if an individual can just purchase a fraction of a viatical
2 settlement and that's enough to purchase a viatical settlement,
3 then there's no pooling. The Court found that was not the case
4 because you, me, and three other people had to purchase enough
5 fractional interest in a viatical settlement to purchase one
6 viatical settlement that was the pooling necessary to meet the
7 element that the D.C. Circuit established in *Life Partners*.

8 THE COURT: All right. You said you wanted to talk
9 about the displacement of CFTC jurisdiction if digital assets
10 are held to be securities, if I would permit. And I can't say
11 I saw where that was in any of the defendants' briefs. So, I'm
12 not sure why, since the government hasn't had an opportunity to
13 respond to that argument, I should let you address that now.
14 Do you want to explain that?

15 MR DAVIS: Two reasons, Your Honor. First of all, it
16 was discussed in the opening brief where we talked about there
17 was no limiting principle for the SEC's theory because it
18 would -- it would bleed into, you know, other assets and
19 commodities and Pokémon cards. We elaborated on that in the
20 reply brief, especially the first five pages where we talked
21 about CFTC's antifraud query. And the SEC brought this up
22 themselves and they cited a letter that was provided by the
23 Office of General Counsel in the *Telegram* case, which I'm very
24 familiar with because I was general counsel for the CFTC when
25 that letter was given to Judge Castel, which describes the

1 coterminous nature of the jurisdiction between the CFTC and the
2 SEC. And you've seen this case very active in this space.
3 What's clear, Your Honor, is that where the CFTC's jurisdiction
4 ends with digital assets, it begins with the SEC.

5 So a decision by the Court helps decide that line.
6 And Congress was clear in Dodd-Frank that they wanted the CFTC
7 to have fraud and anti-manipulation authority for commodities
8 trading. And so if this Court has any doubt or any concern --

9 THE COURT: Well, where is it that the SEC is taking
10 the position that these are commodities and not securities?
11 They seem to be saying -- I mean, there's a very -- I think
12 it's the *Ripple Labs* that says it the most clearly. But all of
13 these cases differentiate between the asset and the manner in
14 which a particular asset is sold and marketed to the public.
15 And, so, I don't see where the conflict is.

16 MR DAVIS: Let me see if I can explain it to Your
17 Honor. The SEC claims you don't need a contract, you -- you
18 know, talk about Mr. Mendro's arguments, if the Court adopts
19 the SEC's view, there's no meaningful distinction between
20 regulated products on the CFTC's purview and what the SEC
21 regulates. It is common in the CFTC markets for an asset to be
22 promoted by somebody and for people to potentially view and
23 even rely on those statements of promotion in determining to
24 purchase an asset. What is missing --

25 THE COURT: Are you saying there would never be, in

1 the investment contract, something that is not itself a
2 security?

3 MR DAVIS: No, Your Honor.

4 THE COURT: That's what all the cases are about,
5 isn't that correct?

6 MR DAVIS: I don't think that's correct, Your Honor.
7 And I'll give the --

8 THE COURT: An orange grove isn't a security, is it?

9 MR DAVIS: No.

10 THE COURT: No.

11 MR DAVIS: An orange grove is not, but a token can be
12 a security if it includes those contractual commitments.

13 Now, you mentioned the DAO report. If you look at
14 the DAO token, that was a token that conveyed voting rights.
15 That was a token that conveyed the rights to proceeds from
16 activities that the DAO decided to engage in. That token
17 itself included an investment contract. The transactions that
18 are happening --

19 THE COURT: So if what they're doing is saying we
20 want to go after what we think are investment contracts --
21 whether you disagree as to whether they qualify is another
22 point -- investment contracts involving the sale of digital
23 assets, how does that conflict with the Commodities Future
24 Trading Commission's ability to do what it's going to do?

25 MR DAVIS: Because the SEC is adopting or -- adopting

1 a theory on investment contract that has no limiting principle
2 and, therefore, it breaches or interrupts the CFTC's
3 jurisdiction.

4 Your Honor, bitcoin and ether products, there are
5 future-based bitcoin and ether products that have been trading
6 on the CFTC for years. There are a number of additional assets
7 that have recent -- digital assets that have been
8 self-certified by CFTC-regulated entities whose jurisdictional
9 basis would be questioned should this Court adopt the SEC's
10 view. The CFTC --

11 THE COURT: Haven't multiple courts adopted the SEC's
12 view and the world did not come to an end?

13 MR DAVIS: No, they have not, Your Honor, because the
14 cases like *Terraform* is an ICO case where there is contractual,
15 you know, arrangements between the two parties. *Ripple* is a
16 little different. There weren't such contractual agreements.
17 It's a type -- from my CFTC background, I recall those spot
18 transactions. And in the business it's understood that spot
19 transactions are under the enforcement jurisdiction of the
20 CFTC.

21 And if you -- you know, the CFTC has brought numbers
22 of cases. The CFTC has asserted USD is a commodity, CFTC has
23 asserted that Tether is a commodity. The CFTC reached a
24 settlement with Coinbase regarding wash sales, which I know is
25 one of the bases for their fraud allegations against us.

1 THE COURT: Apparently, last week the CFTC and these
2 defendants entered into a consent agreement that the BUSD was a
3 commodity. And not one of the 45 lawyers that have entered
4 their appearance for the defendants decided to bring that to my
5 attention prior to this hearing. So, it seems like it was
6 timed so you can stand up here and make this argument to me.
7 It seems very strategic.

8 MR DAVIS: There's nothing strategic about it at all,
9 Your Honor. Quite frankly, I was very surprised when the SEC
10 gave you notice of the DOJ and the FinCEN settlements that they
11 did not mention the CFTC settlement at the same time because
12 those three settlements were named in the exact same press
13 conference. About ten days after the SEC notified this Court
14 of the DOJ and the FinCEN settlements, the CFTC consent order,
15 which had already been discussed publicly, was made public.
16 And so I don't understand why the SEC did not tell you about
17 that settlement either.

18 THE COURT: I went back, because I -- your notice
19 saying, I would like to talk about this, I thought, well, gee I
20 thought they took -- they were taking the position that it
21 wasn't a commodity either because that was where you were at
22 the initial hearing. And so it wasn't until I went back and
23 looked at the docket in the Illinois case that I discovered the
24 consent agreement.

25 So, I guess my point is, though, assuming it's

1 correct and assuming BUSD is a commodity, does that matter? Do
2 you agree that there could be -- and I think you've said yes --
3 an investment contract to sell commodities even if there is not
4 one here? So that doesn't answer the question at the end of
5 the day, does it?

6 MR DAVIS: So I'm saying that secondary market
7 transactions in and of themselves is not sufficient to get you
8 out of the *Howey* test. All right? And that's the distinction
9 I'm making between the DAO token and the DAO report. If you
10 look at all of the allegations regarding all of the third-party
11 digital assets -- and we double-checked over the weekend --
12 there are no allegations regarding voting rights, there are no
13 allegations regarding some sort of, you know, pro rata share of
14 the activity --

15 THE COURT: So secondary transactions in a coin that
16 is initially a commodity can't ever be a security in your -- is
17 what you're saying?

18 MR DAVIS: I don't think I follow the question, Your
19 Honor.

20 THE COURT: I asked you, does it matter, if a
21 particular asset is in fact a commodity, could there be an
22 investment contract to sell that commodity? And your answer
23 was: Not the secondary market. So, I want, first of all, an
24 answer to my original question and then, second, I'm just
25 repeating to make sure I understand that you're saying, if it's

1 a secondary sale of a digital asset, it's always -- you're
2 always selling it.

3 MR DAVIS: I'm not saying that, Your Honor.

4 THE COURT: Okay. Tell me what you're saying.

5 MR DAVIS: What I am saying, if you have a digital
6 asset, that itself does not include the characteristics of a
7 security, right? The ones that are sold on BAM's platform do
8 not. Those types of secondary asset sales are not securities
9 transactions. I am distinguishing that from the DAO report and
10 the DAO token in which the SEC says that DAO token, quite
11 frankly, acts a lot like a stock because it comes with it
12 certain voting rights and certain -- you know, rights to
13 certain, you know, proceeds from the products of the DAO.

14 THE COURT: So there are digital assets, in your
15 view, that could have aspects of a security, all the earmarks
16 of an actual security?

17 MR DAVIS: That is possible, Your Honor.

18 THE COURT: Could there be an investment contract to
19 sell the ones that don't, that are commodities by your
20 definition but are being sold and marketed with the
21 understandings and expectations around it that would satisfy
22 *Howey*?

23 MR DAVIS: It's difficult for me to think of an
24 example of that, Your Honor, because the description you just
25 gave is a very good description of the spot markets that the

1 CFTC has enforcement jurisdiction over. Let me give you an
2 example: Carbon credits. Carbon credit is something that
3 doesn't have any inherent value in and of itself. It's
4 something that people tout left and right about the ability of
5 carbon credits to be useful to help with climate change. The
6 CFTC, not two weeks ago, issued a proposed release asking for
7 comments about voluntary carbon credits. Right? And the fact
8 that it's an ecosystem -- to use a term that the SEC likes to
9 use -- is not sufficient to transform that into an investment
10 contract.

11 THE COURT: What if the money is supposed to be used
12 to create the ecosystem -- a term I'm not really loving either.

13 MR DAVIS: So that goes to the pooling argument, Your
14 Honor. Now, there may be situations where there is money that
15 goes directly from the purchaser to the issuer, where the
16 purchaser has an understanding that those will be used for
17 certain capital promotion activities. Again, not this case,
18 not the transactions happening on the platform.

19 THE COURT: I'm still talking about the hypothetical
20 case. And I want to know, do you agree that there could be an
21 investment contract to sell things that are themselves
22 commodities, even if there isn't one here?

23 MR DAVIS: I guess I would qualify that. They would
24 need to have some other indicia, right? You would need digital
25 asset plus. Right? Because otherwise you're just -- you're

1 selling gold, you're trading natural gas, you're trading oil.
2 You're trading all of the types of products that the CFTC has
3 been long understood to be in charge of with respect to its
4 enforcement.

5 THE COURT: And the reason you're differentiating
6 between commodities and securities is because commodities --
7 basically gold, cotton -- they're fungible, the seller can't do
8 anything about it, can't do anything managerial or
9 entrepreneurial to create their value or to have their price go
10 up in the future.

11 MR DAVIS: Some commodities it's harder. But to go
12 back to my carbon credit example, that is widely understood to
13 be a commodity. Right? I think about less in terms of
14 commodity versus security. I think of it more in terms of CFTC
15 jurisdiction versus assets jurisdiction. Right? CFTC
16 jurisdiction is for those types of products, those assets that
17 lack the type of contractual arrangements that you see in your
18 standard, you know, investment contract, you see in stocks, you
19 see in bonds, you see in all of the 20-some-odd definitions of
20 a security in the securities laws.

21 That's why I think, you know, the argument that the
22 SEC's argument here has no limiting principle is of great force
23 because it creates these complicated questions where someone
24 like me, who has spent, you know, most of the past ten years
25 working in the CFTC side of the ledger, reads the allegations

1 in the complaint, reads the types of attributes of these
2 particular digital assets, and I see oil, I see natural gas, I
3 see carbon credits, I see rare earth metals, you know, that
4 have just a couple of people that, you know, control what
5 happens with them.

6 I also see bitcoin, Your Honor. It takes less than
7 15 minutes of online searching to find a number of people who
8 are very active in the bitcoin ecosystem and who have an
9 important role to play in the development of that --

10 THE COURT: Let's talk about this case. The core
11 allegations in the part of the complaint that talks about BNB,
12 is that Binance coupled the initial coin offering with the
13 representations that it was going to do something, it was going
14 to build a better and more efficient platform, that these coins
15 were going to be worth more because of what it did. I mean,
16 would you be comfortable with a press article coming out after
17 this hearing that said, you know, the Binance lawyers told the
18 Court that Binance couldn't actually do anything managerial or
19 entrepreneurial to sustain or increase the value of BNB or
20 BUSD, that was just all smoke?

21 MR. DAVIS: Not arguing that, Your Honor. So, first
22 of all, my client, BAM, was not involved in the ICO.

23 THE COURT: I know, you were assigned this issue.
24 And I don't know why, actually, because these issues seem to be
25 the other defendants' issues, but you're the one who is

1 standing here.

2 MR DAVIS: So those aren't our issues, but I will say
3 I'm very comfortable saying that it's perfectly legitimate for
4 this Court to conclude that the transactions on these -- on
5 BAM's platform are subject to the CFTC's enforcement
6 jurisdiction. The CFTC can bring claims of fraud --

7 THE COURT: That is just not the question that I am
8 asking. And no one is saying -- and even you are not saying --
9 that something that is a digital asset, something that is a
10 commodity, something that the CFTC could regulate if it chose
11 to do so, could not be the subject of, as opposed to being one
12 in and of itself, an investment contract.

13 MR DAVIS: Maybe I'm misunderstanding the question.
14 Because I don't disagree that a digital asset could be the
15 subject of an investment contract, if that's the way you're
16 formulating --

17 THE COURT: And if SEC went after that, it would be
18 disrupting the jurisdiction of the CFTC, would it?

19 MR DAVIS: If it was indeed an investment contract,
20 it would be disruptive of the jurisdiction of the CFTC because
21 it would be in the jurisdiction of the SEC.

22 THE COURT: Okay. And I think the reason they're
23 saying that this fell within the jurisdiction of the SEC is
24 because it was marketed with the understandings and
25 expectations around it that it was going to use the money to

1 improve its own platform or ecosystem in such a way that people
2 who were buying BNB had a better chance of making a profit than
3 people who are buying Bitcoin. And that was the deal. That
4 was what they were promising. That is why the SEC says it's a
5 security.

6 Now, two counsel have already stood up here and I've
7 read a brief arguing very effectively that unless it's in the
8 contract to do that, it's not an investment contract. And now
9 I have briefs from the SEC and I've read all the cases from all
10 the judges that have said, Not really. So I have to figure out
11 which side of that I'm coming down on. But, what you're saying
12 is, I think, is that unless I actually find the actual contract
13 that the first two lawyers are saying is necessary, that then
14 the SEC has exceeded its jurisdiction. Is that the basic
15 principle?

16 MR DAVIS: That's one of the reasons, Your Honor.
17 The other is something you said in your just last statement.
18 You talked about the issue of taking the money that was given
19 to them. My point regarding the pooling argument is that the
20 transaction that happens on BAM's platform, that money never
21 reaches the issuers and the promoters' hands. So that element
22 is also missing. And that's the *Life Partners* argument that I
23 started off the argument.

24 THE COURT: Was Judge Weinstein wrong in *CFTC versus*
25 *McDonnell* when he said more than one agency could have

1 concurrent jurisdiction?

2 MR DAVIS: I think what Judge McConnell (sic) meant
3 was the type of discussion that we've been having, Your Honor,
4 digital asset itself generally is a commodity, and then you're
5 asking is there something that's being put on top of the
6 digital asset that is sufficient to transform it into an
7 investment contract and move it over to the SEC's jurisdiction,
8 right?

9 So in that sense -- in the broad sense I think what
10 Judge Weinstein was saying was that both agencies have a claim
11 to jurisdiction and it depends on the particular circumstances
12 of the transactions in place. Like when we did -- we were --
13 footnote 11 tells the Court to do, is to analyze the
14 transaction separately. And these, again, like I said, these
15 types of transactions are transactions within the CFTC's
16 enforcement.

17 THE COURT: And why should I entertain the view of
18 one of the defendants that this is a problem for the CFTC, if
19 the CFTC hasn't sought to intervene in this lawsuit and say we
20 have a problem here, Judge?

21 MR DAVIS: Couple of reasons, Your Honor. First of
22 all, the Commodity Exchange Act is there, the Dodd-Frank
23 statutory provisions are there. The CFTC wasn't around when
24 *Howey* was decided. It wasn't around when the securities laws
25 were initially put into place. And just like the *FDA v. Brown*

1 & *Williamson*, you know, the Court considers what the
2 authorities are of the various jurisdictions that claim to have
3 authority there.

4 So I think you can look to that regardless of who
5 comes in and who doesn't come in. It's part of the full
6 analysis of the context of whether there is a real limiting
7 principle to the SEC's theory in this case.

8 Second of all, the CFTC has been very active. As you
9 noted, they brought a case against BHL and Mr. Zhao that
10 settled out, it was determined that BUSD was a commodity. So I
11 say that the CFTC has spoken in this case, and has in other
12 cases. Like I mentioned, they settled the case with Coinbase
13 regarding wash sales, which is a theory that the SEC brings in
14 this case.

15 So I think that that holistic -- there's a third
16 reason. The other reason I think you can bring it up is
17 because, you know, there's a thread in some of the cases, such
18 as in *Woodward* and in *Gary Plastic v. Merrill Lynch*.

19 And in *Gary Plastic* the Second Circuit said, twice,
20 one of the reasons that we're finding that this particular
21 product is a security is otherwise there's no federal remedy
22 available. And with the Dodd-Frank provisions that we talked
23 about and with the jurisdiction of the CFTC, that is no longer
24 the case.

25 And so I think you don't have to ask the CFTC --

1 there's some relevance the CFTC isn't here -- but the presence
2 of their jurisdiction distinguishes the analysis of the Second
3 Circuit in the case like *Gary Plastic*.

4 THE COURT: Right. I just think the issue is whether
5 there's an absence of SEC jurisdiction, and that's what we've
6 been talking about all morning.

7 MR DAVIS: I agree that's the key issue, Your Honor.
8 But, again, because the CFTC's jurisdiction is right up next to
9 the SEC's, wherever you say, it moves the line.

10 THE COURT: Okay. I hear you. All right. Thank
11 you.

12 I would like to hear from Mr. Qureshi now.

13 Good morning. I thought you should get up when it
14 was still morning. Maybe we will still be able to do that,
15 maybe not.

16 Does the consent order in the CFTC case in which the
17 defendants agreed that Binance was offering digital assets
18 under Zhao's direction and control change the personal
19 jurisdiction calculus in any way?

20 MR. QURESHI: It makes our arguments harder, Your
21 Honor, but it's not game over.

22 THE COURT: Okay. Let's talk about something else
23 that also makes your argument harder, which is the criminal
24 plea. I realize, again, it's criminal and it's not saying he's
25 operating an exchange or broker deal or clearing agency, it's

1 talking about something else. But still, it's all talking
2 about what he's personally doing to extend his tentacles into
3 the United States. So now that we've conceded that your
4 argument is harder, tell me why it's still alive.

5 MR. QURESHI: It's still alive for three reasons,
6 Your Honor. The first one you've alluded to, there's a
7 different statutory and regulatory scheme that's in play in the
8 criminal pleas, that's the Bank Secrecy act. There's one count
9 that Mr. Zhao pled guilty to having to do with maintaining an
10 effective AML program. The other reason is timing. When the
11 SEC file its complaint in June, these events, these pleas, they
12 occurred almost six months later. Of course the
13 jurisdiction --

14 THE COURT: But the basis -- I'm not saying it's the
15 fact that he conceded jurisdiction, it's the basis for it,
16 which is his activities from wherever he is that are
17 purposefully directed through either Binance or the U.S.
18 affiliates at the U.S., that is what he's admitted gives these
19 courts, federal courts in the United States, being asked to
20 exercise jurisdiction by federal law enforcement agents is --
21 it's that. It's not the timing of the complaint or the timing
22 of the concession that matters, it's does the underlying
23 conduct suffice?

24 MR. QURESHI: It does not from our perspective, Your
25 Honor. And the reason it doesn't is that these jurisdictional

1 facts were all available to the SEC before it filed its
2 complaint. It conducted a multi-year investigation, had
3 available to it all of these documents that these other
4 agencies have relied on and they chose not to put it in the
5 complaint. That decision has to have consequence.

6 They only allege two causes of action against
7 Mr. Zhou, as you pointed out. Both are failure to register
8 claims. They're both predicated on control person liability.
9 And when you look at other failure to register cases, the SEC
10 is able to establish jurisdiction by alleging things like bank
11 account, active solicitation of the U.S. investors. And when
12 you compare that framework to what's actually in the complaint,
13 they fall short in their opposition, on page 70, they cite
14 eight paragraphs of the complaint that they claim show support
15 that Mr. Zhao maintained signatory authority over U.S. bank
16 accounts.

17 But when you actually look at the complaint, the
18 closest any of those eight paragraphs comes is paragraph 166,
19 and that paragraph says that Binance required that Zhao and/or
20 the Binance back office manager have signatory authority over
21 the accounts. And then just three paragraphs later the SEC
22 concedes, you know what, it was the Binance bank office manager
23 and not Mr. Zhao that had signatory authority over the
24 accounts.

25 And then if you move over to their assertions about

1 active solicitation of U.S. investors, that's really their most
2 powerful allegation. And it's in paragraphs 118 through 140 of
3 the complaint. The headline there is Mr. Zhao used his social
4 media platforms to actively solicit U.S. investors, but then
5 the specific facts that support that assertion, there's only
6 one, paragraph 216, they say that Mr. Zhao had a Twitter
7 account and he posted when there were new products or services
8 available in either of the platforms. That's not enough. So
9 they pivot to this strategy of saying that Mr. Zhao directed
10 Binance to encourage U.S. investors to concealed their U.S.
11 locations.

12 Okay, we have a conclusory assertion. Let's look at
13 that under the framework of the specific facts that they're
14 required to allege. Paragraph 129, they attribute a statement
15 to Mr. Zhao. All he says there is that VIP customers
16 contribute to a large volume and they ought to conduct their
17 activities on the platform through foreign registered
18 companies. That's it.

19 Paragraph 131, he acknowledges that customers can
20 supplement their KYC information. And in paragraph 133 they
21 refer to a VIP handling document. But the document, as quoted
22 by the SEC, actually says, "We cannot teach users how to
23 circumvent controls." There's no allegation that Mr. Zhao
24 wrote the document, that he approved its contents, or that he
25 even reviewed it. It's their burden to prove a *prima facie*

1 case of specific personal jurisdiction in connection with the
2 two claims they brought against him. And it's our position
3 they haven't done that.

4 THE COURT: Right now they just have to plausibly
5 allege it, right?

6 MR. QURESHI: They have to plausibly allege it with
7 specific facts and not conclusory assertions. That's what
8 this Court has instructed over and over again.

9 THE COURT: And one of the things the parties talk
10 about is the weight to be given the control person allegations.
11 And if I agree with you and with Judge Huvelle, I think that
12 the Sixth Circuit is correct and control person allegations
13 standing alone are not sufficient. Are you saying that there
14 are no allegations in the complaint that go beyond that, that
15 go to him personally?

16 MR. QURESHI: There are conclusory assertions that go
17 to him personally, but we don't think they're the requisite
18 specific facts that are tied directly to these causes of
19 action. They may refer to him strong-arming the CEO of BAM to
20 allow BNB to be traded on the platform. That's got nothing to
21 do with the two claims they brought against him, whether or not
22 these platforms were required to be registered. That's our
23 position.

24 THE COURT: All right. I know there have been a lot
25 of other issues addressed by the other lawyers on behalf of all

1 of the defendants, but is there anything else that I haven't
2 asked you about right now that you want to emphasize on behalf
3 of Mr. Zhao?

4 MR. QURESHI: No, Your Honor. We join all of the
5 other dismissal arguments. We just bring a separate 12(b)(2)
6 motion for lack of personal jurisdiction.

7 THE COURT: Thank you.

8 What I would like to do then is, so everybody else
9 and our court reporter can function, is take a ten-minute break
10 before I hear from the SEC. Thank you.

11 (Recess from 11:37 a.m. to 11:53 a.m.)

12 THE COURT: All right. Let me hear from the SEC,
13 please.

14 MS. FARER: Good afternoon, Your Honor.

15 THE COURT: Good afternoon. All right. Is it fair
16 to say -- did you need a second to organize yourself?

17 MS. FARER: I appreciate it. I'm a paper person.
18 And while I'm doing that, Your Honor, I would like to highlight
19 that I will be handling most of the *Howey* issues, which some of
20 my colleagues will be handling *Morrison*, major question,
21 jurisdiction and fairness.

22 THE COURT: All right. I think that's the way I've
23 got this organized, but if there's something that's somebody
24 else's issue, just tell me when I ask the question and I'll
25 save it.

1 Just to get started, is it fair to say that the SEC
2 is not taking the position that every digital asset, token, or
3 crypto asset is a security?

4 MS. FARER: Yes, Your Honor.

5 THE COURT: And it's also your position -- not your
6 position that one of the these tokens standing alone is a
7 security simply because somebody who buys it might make a
8 profit?

9 MS. FARER: Yes, Your Honor.

10 THE COURT: Now, do you agree that there is a
11 difference between the coins, the subject of the investment
12 contracts, and the contracts themselves? That is, the totality
13 of the circumstances, or as the *Telegram* case puts it, the full
14 set of contracts, expectations, or understandings surrounding
15 how any particular coin is sold or distributed, and it's the
16 latter that's dispositive?

17 MS. FARER: Yes, Your Honor. The crypto asset, as we
18 briefed, as Your Honor has seen in these cases, is simply a
19 line of code and what we're looking at is the economic
20 realities and the totality of circumstances of how they're
21 offered and sold.

22 THE COURT: All right. So in particular then, would
23 you agree that there's nothing about a stablecoin, with its
24 value pegged to something else, that in and of itself would
25 make it a security, as opposed to just an asset?

1 MS. FARER: The allegation in the complaint, Your
2 Honor, is that it's offered and sold as an investment contract
3 based on its opportunity for other profit-yielding measures.
4 And this so-called "stablecoin" term is a characterization that
5 defendants make and is a facts-and-circumstances test that we
6 need to bear out if the Court finds that dispositive. But
7 that's not the claim before the Court, Your Honor.

8 THE COURT: But as to those in particular, or all of
9 them, I guess, a standalone sale is not enough, it has to be
10 based on how it was sold and marketed?

11 MS. FARER: Correct, Your Honor. You would have to
12 take all of the complex realities, including promotion, the
13 efforts of the issuers, the retention of any tokens. I could
14 go through a variety of categories and factors that are
15 evaluated in these cases.

16 THE COURT: All right. The complaint alleges that
17 BNB and BUSD were created on the Ethereum blockchain. Have you
18 identified any crypto assets as securities that were not, that
19 are -- in other words, is there anything about the validation
20 method that factors into the *Howey* analysis, or is it all still
21 about how it is sold and marketed? I want to make sure I
22 understand the boundaries of what we're dealing with.

23 MS. FARER: I'm not sure I exactly understand your
24 question, Your Honor, but I will note that the technology at
25 issue here is important for the Court's consideration because

1 when someone buys a token, they are necessarily inextricably
2 intertwined with the blockchain and the values of the token
3 rise and fall together.

4 So the investors are all interdependent and reliant
5 upon the efforts of those who are creating the blockchain,
6 developing the blockchain, continually maintaining the
7 blockchain, adding particular apps or other protocols on top of
8 the blockchain. That's a significant feature here that
9 defendants ignore, that all of these -- based on the nature of
10 the technology, there is a common enterprise and everyone is
11 inextricably intertwined and interdependent, which was the
12 critical determinate factor *Life Partners* was looking at.

13 THE COURT: Well, that goes to the buyers. But does
14 that make them interdependent with the issuers or the sellers
15 necessarily?

16 MS. FARER: It makes it interdependent on their
17 efforts because the ongoing -- the ongoing technology in terms
18 of the development of the blockchain, the maintenance of the
19 blockchain, different protocols and programs that are alleged
20 in our complaint that increase the value of these particular
21 tokens.

22 BNB is a good example, Your Honor, where Binance and
23 Mr. Zhao have developed a number of investment programs that
24 are developed here and other protocols that tie into their
25 ecosystem. And as a result of that, again, the technology

1 makes all of this inextricably intertwined.

2 THE COURT: So is that what differentiates these from
3 commodities in your viewpoint? That you can't just sell one
4 and leave it out there like a gold bar?

5 MS. FARER: It is one differentiating factor. The
6 defendants make a lot about market forces and point to those
7 cases that involve gold bars, precious metals, et cetera, and
8 in doing so the defendants ignore the integral efforts that
9 defendants make in developing, maintaining, and enhancing the
10 ongoing market at issue here.

11 THE COURT: But that alone wouldn't be enough, if you
12 didn't make all three of the *Howey* factors.

13 MS. FARER: Correct, Your Honor. It is one factor
14 for the Court's evaluation here. Alone it is not
15 determinative, but it is an important factor with respect to
16 these crypto assets.

17 But also, to Your Honor's point that, as we've
18 alleged for BNB and other tokens, the issuers, promoters,
19 et cetera, retain a significant repository of these tokens,
20 both to message to the market -- this is expressed, for
21 example, in Viola coin -- that they are tied to the ongoing
22 development efforts and their value of the tokens that they
23 retain rises and falls without the investors, based on their
24 efforts.

25 THE COURT: All right. And I don't know if this

1 is -- well, first, I just want to make sure that I understand
2 the complaint completely. And I want to make sure, is there
3 any count in the complaint that does not depend on a finding
4 that crypto assets sold to U.S. customers were in fact
5 securities?

6 MS. FARER: One moment, Your Honor.

7 THE COURT: I don't think so.

8 (Pause.)

9 MS. FARER: Your Honor, we consider the fraud claim
10 based on investors. That does not turn on whether the crypto
11 asset security at issue here qualifies as investment contracts.

12 THE COURT: All right. So Count 13 against BAM
13 Management and BAM Trading, is that the one you're talking
14 about?

15 MS. FARER: Yes, Your Honor.

16 THE COURT: All right. And it alleges that they made
17 materially false and misleading statements to investors and
18 engaging in acts and practices that operated as fraud upon
19 purchasers in the offer and sale of securities. So when you're
20 talking about investors there, you're talking about investors
21 in those entities?

22 MS. FARER: In the BAM entities, yes, Your Honor.

23 THE COURT: Okay. All right. And that would matter
24 even if we're not talking about the offer or sale of
25 securities?

1 MS. FARER: With respect to the crypto asset tokens,
2 yes, Your Honor.

3 THE COURT: All right. Now, I don't know whether
4 this is a you question or a question for someone else, but if
5 it's so obvious that these are securities, where has the agency
6 been and why isn't it relevant that the SEC took the opposite
7 position or no position for so many years?

8 MS. FARER: One of my colleagues is going to handle
9 the due process, fair notice argument Your Honor.

10 THE COURT: All right.

11 MS. FARER: As Your Honor recognized, we have issued
12 prior guidance, and even the 2017 guidance that Your Honor
13 referenced includes references to cases from 2013.

14 THE COURT: All right. And the time-barred issue, is
15 that also for somebody else?

16 MS. FARER: No, that's me, Your Honor.

17 THE COURT: Let's talk about that then. Why aren't
18 the claims as to the initial ICO, whether it's contract or not
19 a contract, time barred?

20 MS. FARER: All right. One moment, Your Honor. I
21 will highlight, as I'm rifling through my papers here, that the
22 Securities Acts Section 5 claim as it pertains to BNB is not
23 limited to the ICO. The complaint specifically alleges that
24 the -- that there are ongoing primary sales from Binance. This
25 is paragraph 288. From the time of the ICO to the present BNB

1 was offered and sold as an investment contract and, therefore,
2 as a security.

3 Paragraph 299 does not limit the allegation to the
4 ICO where it alleges that Binance offered and sold BNB as an
5 exchange token, marketing it to investors as investment in the
6 success of the Binance.com platform and touting potential
7 returns that investors could achieve from purchasing the token
8 on the platform. And other paragraphs --

9 THE COURT: There you're not talking about secondary
10 sales, you're talking about it selling directly to the public?

11 MS. FARER: Correct, Your Honor. These are direct
12 sales from Binance. So I just want to clarify that there are
13 ongoing primary direct sales that fall within our particular
14 claim.

15 And then in addition, we -- a portion of our claim
16 relates to the offer and sale of BNB to employees. So there
17 are a number of direct sales for purposes of that claim beyond
18 simply the ICO.

19 That being said, we do maintain that the claim as it
20 pertains to the ICO is not time barred. And I think that
21 defense counsel mischaracterizes the law with respect to the
22 fact that the statute of limitations does not need to -- does
23 not start to run until -- unless and until the defendant is
24 within the United States.

25 Your Honor asked if a court had grappled with the

1 very issue about whether, you know, someone was always outside
2 of the United States. And I believe it was -- the *Sharp* and
3 *Straub* cases are the two cases that touch on this issue, Your
4 Honor, and they've really traced the history of this provision,
5 saying initially when this particular language -- they're
6 talking time when the penalty language in 2462 was added, the
7 legislators recognized that they only had the ability to
8 provide for personal service in the United States. And so they
9 specifically included that language to protect against external
10 service, that, notably, the Court said that language has not
11 changed and even though we are now in a world where there is
12 worldwide service of process opportunities through the Hague or
13 elsewhere, that does not change the analysis.

14 The point the courts are focused on with respect to
15 these positions is not location for purposes of personal
16 jurisdiction, subject matter jurisdiction, it is solely for
17 purposes of service. And here, as Your Honor acknowledged, the
18 defendants are nowhere and everywhere and have not authorized
19 any of the employees upon which they point to to accept service
20 in the United States. And notably, the analysis for purposes
21 of this defense must rise and fall on the allegations in the
22 complaint. And the complaint says that at no time during these
23 periods was the defendant in the United States.

24 THE COURT: All right. I want to get into the
25 particular assets at issue and I want to start with BNB and the

1 Howey test. Person investing money, I think there's not that
2 much to discuss there. Then we get to in a common enterprise.
3 Now, is it your theory at the time of the ICO that there was
4 horizontal commonality, broad vertical commonality, or strict
5 commonality?

6 MS. FARER: All three, Your Honor.

7 THE COURT: The only D.C. Circuit statement I see
8 about what commonality consists of is the one in *Banner Fund*
9 that said the test is ordinarily met by a showing of
10 horizontal. And the New York cases you cite generally also all
11 talk about horizontal, although *Telegram* also talks about the
12 possibility of strict commonality as an option. But is there
13 any circuit support for the notion that there is a vertical
14 option?

15 MS. FARER: Yes, Your Honor. I believe the Eleventh
16 Circuit focuses primarily on broad or strict. And I defer to
17 my colleagues who may be better -- have better recollection of
18 the particular circuit split on some of these tests. But I do
19 know that not all of the circuits -- I think the *Bitcoin* case,
20 for example, refers to the vertical commonality and not all the
21 circuits require horizontal commonality.

22 I would also note, Your Honor, that the Supreme Court
23 hasn't adopted any of the tests at issue. And what the Supreme
24 Court is focused on is the common enterprise. And these
25 circuits have developed these tests as a construct to evaluate

1 the interdependence at issue between the investors, the success
2 of the enterprise and the fortunes of the issuers or promoters.
3 As I previously stated, with respect to this technology, that
4 interdependency, left, right, up, down, is present. And here,
5 with respect to the particular tokens, and BNB in particular,
6 there is a pooling, if the Court requires that.

7 But as the Court recognized in *Life Partners*, the,
8 quote/unquote, pooling, it looks past sort of the
9 administrative handling of the funds. And the Court in that
10 case did stress that it was focused on the interdependency.
11 And while defense counsel is correct in that one could view
12 that there was pooling in that particular case, even with the
13 staggering of purchases, the Court stressed that the
14 interdependency was the focus. And I think that if the Court
15 looks at the themes and analysis of all of the tests across the
16 circuit, that's the Court's focus.

17 THE COURT: All right. Well, I want to stick --
18 we're just talking about BNB right now. And certainly the
19 initial stage, are you suggesting that there was pooling of the
20 assets that came in from the investors?

21 MS. FARER: Yes, Your Honor.

22 THE COURT: Now, one of the things you did was point
23 to the statement of the district court in *Life Partners* as a
24 source for the statement in the brief that courts in this
25 district have evaluated broad and strict vertical commonality.

1 But when you get to the circuit opinion, it only talks about
2 horizontal, it never mentions vertical at all, in either of its
3 decisions. So should I draw any conclusion from that?

4 MS. FARER: Yes, Your Honor. The cite that we had in
5 the brief was simply to reference that courts in this district
6 have evaluated the variety of the tests and the circuit court
7 in *Life Partners* found horizontal commonality present and so
8 determined that it didn't need to reach the other tests. So
9 the question remains open in this circuit as to whether the
10 circuit has adopted one test over another. It just has looked
11 at horizontal commonality. In the instance of *Life Partners*,
12 found that sufficient and moved on. But in other cases in the
13 district, as we highlighted and as the district court
14 highlighted, courts have looked at the variety of the tests.

15 THE COURT: All right. I think that the thing that
16 most differentiates this situation or a securities situation
17 from a commodities situation, because in a commodity everybody
18 is buying something, is buying something that goes up and down
19 the same way as to all of them is the third element when you
20 get to the expectation of profits solely from the efforts of a
21 third party.

22 So what is your response to the argument by one of
23 the amici that, sure, issuers say lots of things, issuers say
24 we're going to build the best platform ever. But what's the
25 support that it was reasonable for buyers to rely on that sort

1 of thing?

2 MS. FARER: It's reasonable, Your Honor, for one
3 of -- first, the reason I said it is that these issuers, many
4 of them, and including all of the ones that are alleged in our
5 complaint, have retained tokens, so they -- as their efforts
6 impact the value of the enterprise, the value of the particular
7 crypto asset securities goes up and they benefit just like
8 other investors -- just like the investors on the platform.

9 In addition, Your Honor, we just have ongoing
10 statements where they represent that they are going to make
11 these ongoing efforts, and they do in fact do so. The
12 allegations show that this is in fact occurring. And so the --
13 you know, at this stage, Your Honor, the standard is that all
14 facts alleged in the complaint and reasonable inferences
15 thereupon must be accepted as true and viewed in the light most
16 favorable to the plaintiff.

17 THE COURT: Well, do you agree with the approach
18 taken by the court in *Ripple Labs* that what a reasonable,
19 sophisticated institutional investor might understand is
20 different than what a member of the public might reasonably
21 understand? Does it matter who the asset is being marketed to?

22 MS. FARER: We disagree with that particular portion
23 of the *Ripple* decision, Your Honor. *Howey* does not draw a
24 distinction if classes of investors. It's an objective test of
25 a reasonable investor.

1 THE COURT: So are they saying at the outset we're
2 holding onto some of these coins? I mean, is that something
3 that John Q. Public is relying on when he's making a decision?

4 MS. FARER: Yes, Your Honor. And courts have found
5 that exact point. And often in the distribution papers there
6 will be a file, for example, it's either in the white paper or
7 an associated terminomics paper where that distribution is laid
8 out. And as to the facts alleged for the other third-party
9 tokens at issue, that is also the case. And in particular to
10 BNB, which is the focus of Your Honor's questions, the
11 retention of tokens by Mr. Zhao and others and offering that
12 for employees was publicly marketed and promoted.

13 THE COURT: All right. Well, this question is
14 somewhat related to the concept, I think, of whether a
15 contractual promise is needed. While courts have agreed with
16 you that there doesn't have to be a written contract that binds
17 the issuer to do the things that increases the asset's value,
18 it's true that in *Howey* there were separate contracts that
19 covered what the seller was supposed to do, and in many of the
20 other cases that we're relying on here there were.

21 Here what you have is promotional and marketing
22 statements. And is that enough? Is it enough to say this is
23 how it was marketed, as opposed to it was sold with a specific
24 set of understandings?

25 MS. FARER: It can be enough, Your Honor. The courts

1 look at the totality of the facts and circumstances, all of the
2 .com realities relating to the offer, sale, plan of
3 distribution, marketing, and efforts to evaluate whether there
4 is an investment contract at issue.

5 THE COURT: Well, was Binance bound in any way to do
6 what it said it planned to do? I mean, what if it didn't use
7 the proceeds to develop the proof-of-stake protocol or develop
8 the platform? Does that matter?

9 MS. FARER: No, Your Honor. As we've argued in our
10 brief, a contractual obligation, privity, whatever defendants
11 want to call it at the moment, a commitment undertaking,
12 et cetera, a legally enforceable agreement is not required.
13 Indeed, Your Honor, the securities laws were enacted to --
14 because there was a finding that there were deficiencies in
15 common law protections, like contract law.

16 Congress wanted to make sure that investors were
17 protected in both the offer and the sale. If -- defendants
18 have not explained how their contractual arrangement,
19 obligation, however they frame it, reconciles with the fact
20 that these securities laws regulate offers, as well as sales.
21 And Courts have found that "offer," for terms of the security
22 laws, is broader than common law contracts for offering sales.

23 I will also highlight, Your Honor, that it's
24 interesting to us that the parties seem to be referring to the
25 same cases for diametrically opposite positions. So I just

1 want to give a little bit more context to the *Joiner* case at
2 issue.

3 Interestingly, if you look at the underlying record
4 of that case, notwithstanding that it's decades ago, the court
5 was pressed with many of the same arguments defendants make
6 here about the expansion and lack of limiting principles, the
7 example at the time -- it was not Beanie Babies or Pokémon
8 cards -- but given the times, was ration cards and the risk of
9 usurping the functions of Congress. So since *Joiner*, since the
10 1940s, these very same arguments have been considered and
11 routinely rejected.

12 In analyzing and going to the textual analysis here,
13 I think that the analysis that the court undertook in *Joiner* is
14 helpful on this point as well.

15 In analyzing the facts and circumstances at issue,
16 the court looked at the various categories, including in the
17 statutes, terms "security" -- noticed that some, such as
18 "notes, bonds, and stocks" are pretty much standardized and the
19 name alone carries well-settled meaning.

20 It elaborated that others are of a more variable
21 character and were necessarily designated by more descriptive
22 terms, such as transferable share, investment contract, and in
23 general any interest or instrument commonly known as a
24 security. We cannot read out of the statute these general
25 descriptive designations merely because more specific ones have

1 been used to reach some kinds of documents.

2 Now, defendants argue that "contract" is a standard
3 term and needs to be read by the plain text. The Court
4 explained that's not how we analyze the term "investment
5 contract." It is a descriptive term, and it goes on to say
6 that the reach of the act and application of this particular
7 term is -- doesn't stop with the obvious and commonplace.

8 THE COURT: Okay. Well, even the cases you point to,
9 such as *Telegram*, when they talk about the totality of the
10 circumstances, they talk about contents of the instruments in
11 question and the expectations and the understandings. Are
12 there any written instruments, besides the marketing materials,
13 that you're relying on with respect to whether BNB is an
14 investment contract?

15 MS. FARER: Your Honor, the complaint has a number of
16 allegations with respect to contracts at issue, the terms of
17 use, the -- under defendant's argument a written agreement is
18 not required and some type of privity. And so, arguably, the
19 privity for ICO holder, ICO purchasers would be present there,
20 as well as any other purchasers making direct purchases from
21 Binance.

22 But as we said, Your Honor, that relationship and
23 those obligations we don't believe are necessary, but the
24 complaint does have a number of allegations that give rise
25 to -- that reference a number of other contracts at issue,

1 combinations, arrangements. Again, however, defendants want to
2 put that --

3 THE COURT: With respect to BNB in particular, are
4 you relying on something other than the marketing materials and
5 the social media statements and the white paper?

6 MS. FARER: No, Your Honor.

7 THE COURT: All right. One factor you pointed to is
8 the Binance statements that it was going to burn BNB
9 periodically to sustain its value. And one of the amici, I
10 think it's the Investor Choice Advocates Network, took issue
11 with predicated a finding that an asset is an investment
12 contract on sort of preprogrammed, built-in supply rules. Are
13 you talking about preprogrammed, built-in supply rules in
14 connection with BNB, or was that something that was up to
15 Binance's discretion to do whatever it wanted to do with it?

16 MS. FARER: The particular allegations that we make
17 with respect to BNB are strategically implemented by Binance
18 and Mr. Zhao. And Mr. Zhao even touts this very point in
19 talking about the burn and saying that it could be -- it's
20 treated similar to a dividend. So he highlights that this is a
21 strategic planning that they have implemented to give rise to a
22 reasonable expectation of profits based on their efforts.

23 THE COURT: One of the things that you mentioned is
24 the fact that these assets could be staked. And how does that
25 bear on whether they're securities or not?

1 MS. FARER: It depends on the particular offerings.
2 Staking in and of itself is a consensus mechanism that
3 facilitates the blockchain. But we have allegations relating
4 to staking programs or --

5 THE COURT: Right. We'll get to those.

6 MS. FARER: Right. So in those instances the way in
7 which the particular staking program is offered and sold is --
8 we've -- we allege that that is an investment contract.

9 THE COURT: All right. So just the fact that it can
10 be staked, that's something that the buyer is doing for his own
11 purposes, to increase his value or to use its value for
12 something. That's not something that's dependent on the
13 efforts of others to give it its value, is it?

14 MS. FARER: In the programs that we have alleged, the
15 particular programs at issue are dependent upon the efforts of
16 others because the efforts that we need to look at, as everyone
17 agrees, would be entrepreneurial and managerial ones. And as
18 *Life Partners* explains, those are the ones that efforts are
19 those that determine or impact the reward itself. And the way
20 that Binance markets and executes its particular staking
21 programs -- and when I say "Binance" in that particular
22 instance, I'm also referring to the BAM defendants for the
23 staking claim against them -- is that they have a strategy and
24 manage the program in such a way and manage the technology and
25 the pooling of assets that directly impacts the rewards that

1 may be distributed to the investors on their platforms.

2 THE COURT: All right. I'm going to talk about the
3 staking programs in a minute. I'm just going back to whether
4 BNB itself was being marketed and sold as the security. And
5 one of the things you mentioned was that it could be staked.
6 And I don't see how that, separate and apart from the staking
7 programs, enhances or changes the calculus as to whether it's a
8 security or not.

9 MS. FARER: It is, Your Honor, in the sense of that
10 if one looks at the totality of the circumstances and how the
11 particular crypto asset is offered and sold. And so, Binance
12 has generated and created a number of investment programs that
13 provide for the deployment of BNB specifically to attract
14 investors, increase demand in its value. There are statements
15 in our complaint and in the supporting materials that we
16 filed --

17 THE COURT: So that's the thing that Binance is
18 doing, permitting you to use it in that fashion, that enhances
19 its value that they said up front that you could do? Is that
20 the point?

21 MS. FARER: Correct, Your Honor.

22 THE COURT: You've pointed out that in some
23 circumstances Binance crypto assets were used as compensation.
24 So how does that advance the investment contract argument? In
25 *Ripple Labs* the Court said, well, if a token is being used as

1 compensation, that takes it out of *Howey* because there's no
2 money being invested as the first element. So how does that
3 bear on the decision?

4 MS. FARER: Yes, Your Honor. The *Houghton* case and
5 the *One-O-One Enterprise versus Caruso* case from this District,
6 as well as others, provide the "investment of money" prong can
7 be satisfied with the provision of services. And here the
8 employees, through the acceptance of an offer of employment
9 when it relates to an incentive bonus, for example, they just
10 give up their rights to the specific consideration at issue
11 that -- and provide for the receipt of BNB.

12 THE COURT: Well, if the company says we're giving
13 you this as your compensation, are you saying that the
14 employees had a choice about that? Is it alleged that they had
15 a choice?

16 MS. FARER: Well, whether they have a choice, Your
17 Honor, is something that isn't appropriate for resolution at
18 this stage. The complaint alleges that the employees gave
19 their services, time, and efforts in exchange for BNB, and
20 that's all they're required for the investment of money.

21 THE COURT: All right. Back when I asked you if
22 marketing statements are enough if there's no actual contract
23 or obligation to do what they say they're going to do, and you
24 said it can be enough, we look at all the economic realities.
25 So, the amicus briefs and the defendants are saying, well,

1 that's a little vague. Where's the boundary of that? So
2 what's your answer to that? When can it be and when is it not
3 enough?

4 MS. FARER: So, Your Honor, I think it may be helpful
5 to point to some of the courts that have analyzed this very
6 issue. And again, interestingly, these are some of the same
7 cases that defense counsel relies on. But in cases such as
8 *Scoville* from the Tenth Circuit, *U.S. v. Bowdoin* from this
9 District, *SG Limited*, *Gary Plastic*, *Joiner*, *Glen-Arden*
10 *Commodities*, and the list goes on. The, quote/unquote,
11 contract that may have been in issue isn't the instrument or
12 representations associated with the expectations of profits and
13 the efforts of others, which is the critical determination
14 here.

15 So defense counsel talks a lot about the facts and
16 circumstances. And there are contracts here, but there are a
17 number of examples that there may a contracts for *SG Limited*,
18 for example, the contracts was associated with the purchase of
19 whiskey, but the promises in marketing and the reliance on the
20 effort of others was derived from marketing.

21 Similar to *Gary Plastic*, the marketing in the form of
22 the information bulletin and other sales communications, it was
23 those messages talking about profitability and what they were
24 going to do about the secondary market, et cetera, that's what
25 gave rise to the investment contract. It wasn't -- and *Gary*

1 *Plastic* didn't have a contract at all. But in these other
2 cases where -- like *SG Limited*, for example, where there was a
3 contract, that wasn't the determinative factor in terms of
4 whether it was an investment contract.

5 THE COURT: One of the things you provided as
6 supplemental authority is Judge Rakoff's opinion in *Terraform*
7 for this summary judgment stage, where he uses the *Howey*
8 language -- we're still talking about the third *Howey* language
9 in BNB -- about profits based solely on the activity of the
10 promoter. Is it your position that market forces and other
11 factors don't affect the value of BNB?

12 MS. FARER: Market forces may be involved here, but,
13 again, the defense counsel's focus, its sole focus on that
14 being the sole determinative is just a false dichotomy here
15 because it disregards that the market at issue was created and
16 continues to be developed and enhanced by Binance. And I'm not
17 saying that just in the terms of development of the technology
18 and ecosystem, I'm saying they created Binance, they marketed
19 and increased the demand for value. They have mechanisms in
20 place, like the burn mechanism, for example, that impacts
21 supply and demand. So they are doing -- they create new
22 programs where they expressly say that they're trying to
23 attract new purchasers.

24 So what the focus simply on market supply and demand
25 ignores, all of the allegations in the complaint with respect

1 to BNB and these other tokens and just the realities of this
2 space in general.

3 THE COURT: So if the -- the price of the coin is
4 going up and down and what you're saying is what they're doing
5 managerially isn't staffed during that period, they can do
6 things that affect the price continuously, not just at the
7 outset --

8 MS. FARER: Correct, Your Honor.

9 THE COURT: -- how do the allegations that Binance
10 made the coin available for sale on other on other platforms
11 tie into your theory? I mean, once it's out there, how do they
12 have any control anymore on what's happened?

13 MS. FARER: The development of a secondary market is
14 a factor that courts have looked at in terms of whether there
15 are -- there is a reasonable expectation based on the profits
16 of others. The widespread adoption of these tokens is an
17 important factor. If you look at some of the statements in the
18 allegations for the third-party tokens, for example, Your
19 Honor, folks are really focused on widespread adoption.

20 There are a number -- I mean, this is just code, so
21 these issuers need to find a way to distinguish their
22 particular project and token from all of the others at issue
23 and they want to -- they give rise to a reasonable expectation
24 of profits, but they're marketing that we're going to develop a
25 secondary market, you're going to -- liquidity is important for

1 these investors. You're going to be able to sell these tokens
2 and make a profit in these markets. And as we alleged in our
3 complaint and argued in our brief, this development of a
4 secondary market is intentional, it's just not by happenstance
5 that these tokens are appearing on various platforms.
6 They're --

7 THE COURT: Let's say that's a going-in promise that
8 affects our going-in representation, expectation created by the
9 issuer that affects when somebody buys it the first time
10 whether they're participating in an investment contract. But
11 you're suggesting that there's an across-the-board rule that
12 once something was sold as a contract, as an investment
13 contract, that it retains its character as a security forever?
14 How is that consistent with all the case law that says whether
15 something is a security or not, you have to look at the
16 totality of the circumstances surrounding its sale and
17 marketing.

18 If somebody just goes to another platform and
19 they're, like, which one do I want? I guess I'll take two
20 Binance and two of somebody else. How does that now -- why is
21 that still a security and it's not a commodity anymore?

22 MS. FARER: So, Your Honor, to clarify, if anything
23 that I said suggested that we think something once an
24 investment contract is always an investment contract, that's
25 not the case. That's not our position at issue.

1 THE COURT: Okay. So when you're talking about
2 secondary sales of BNB, then what is your position about why
3 even when it's resold it's a security? I thought you took that
4 position pretty strongly.

5 MS. FARER: With respect to BNB, yes, Your Honor.

6 THE COURT: Yes, and if it's not because it was when
7 it started because all these expectations were baked in from
8 the beginning, then why is it?

9 MS. FARER: It's because there are continuing,
10 ongoing efforts on the part of Binance and Mr. Zhao and others
11 with respect to the marketing and promotion as an investment,
12 the marketing of their efforts and tying the value of BNB to
13 their ecosystem and the efforts that they are developing the
14 platform, bringing in all these new programs, including
15 relationships with third parties, they -- I think Mr. Zhao even
16 said that when they're focusing on -- when they're advertising
17 new programs, he said, "For anything we are significantly
18 involved in, we'll push BNB as much as we can."

19 So this is an ongoing enterprise, that they are
20 marketing an investment opportunity to new BNB purchasers
21 beyond, well past the ICO and to the present.

22 I would contrast this, Your Honor, for example, the
23 Bahamas test that was discussed in the *Telegram* case where the
24 court was grappling with similar limiting principles and said
25 this isn't a situation where everyone associated with the

1 development of this platform and this token just went off to
2 the British Virgin Islands or the Bahamas and there was no
3 further connection to this enterprise or ongoing efforts.
4 That's -- that's just not present here for BNB and all those --

5 THE COURT: There may be an ongoing relationship to
6 the product, but didn't *Telegram* require that after the
7 initial -- for the court to reach resales after the initial
8 distribution, you needed allegations that the resale was
9 specifically contemplated and that there were understandings at
10 the beginning that this was going to happen?

11 I mean, every single case you've cited talks about
12 totality of the circumstances. What are people telling the
13 investors when they buy? And what you're saying is Binance is
14 still out there touting BNB, and that distinction is to make
15 every downstream sale a sale of a security?

16 MS. FARER: Your Honor, it's not that they touted BNB
17 at the start and were asking the court to accept that that
18 continuing promise is enough -- it may be enough in certain
19 circumstances, but that's not what is present here. There are
20 continuing representations by defendant Binance and Mr. Zhao
21 and others related to Binance about their efforts to enhance
22 the value, about the profitability and investment opportunity
23 for investors.

24 THE COURT: Well, one of the things that you said in
25 your brief when you made this argument was, well, secondary

1 sales of stock in a company are still dependent on the
2 management of the company, even after the IPO and the stock.
3 But stock is different, stock doesn't have to make a -- meet
4 the test of an investment contract. So if the buyer and the
5 ICO could reasonably think Binance is going to use my
6 investment and it's going to develop this platform and it's
7 going to support this coin, and you're not saying that carries
8 over, necessarily, after the buyer sells it to someone else,
9 what are the expectations and understandings for contracts that
10 are the circumstance that surround any resale? And also, how
11 do you meet the investment of money situation because the
12 second buyer isn't giving the money to Binance, they're giving
13 it to the owner of the coin.

14 MS. FARER: So, Your Honor, the token itself
15 represents the investment contract. And this will go to both
16 points of the, quote/unquote, investment of money and the
17 ongoing efforts. I will just note, Your Honor, for the
18 investment of money prong, a capital contribution is not
19 required and no court has said that it is. The -- what is
20 occurring here is the purchase of the token is you're buying
21 into the enterprise. And as the court in *Joiner* said, that the
22 investment contract is interwoven with the particular
23 instrument at issue.

24 And so here there is a pooling at the initial ICO and
25 the investors purchase based on marketing and the promise of

1 profitability, that these -- and that these -- that was based
2 on the efforts of the issuers and promoters. That then carries
3 through with the token. The token represents and embodies that
4 investment contract. And nothing has changed simply because
5 someone buys it directly from the purchasers on the -- in a
6 primary sale ICO or on a resale. There are still all of the
7 allegations alleged in the complaint about the representations
8 about profitability, the structure of the holdings by the
9 particular issuers, where their value is tied to that of the
10 investors. They are continuingly -- they have to maintain the
11 blockchain.

12 This is not an asset that has inherent value in and
13 of itself. Its value derives solely from the blockchain and
14 related products at issue and the -- as alleged in the
15 complaint with respect to BNB, but for all the other tokens,
16 that there are ongoing representations about what they're going
17 to do, and they are in fact doing it, as demonstrated by the
18 continued viability of this token and this market.

19 THE COURT: All right. Well, I'm not sure I have
20 heard from the SEC before that token represents the investment
21 contract. That is -- there was very nice, clear distinction in
22 *Ripple Labs* between the item that is the subject of the
23 investment contract and the investment contract, which is the
24 totality of the understandings and expectations that surround a
25 particular distribution or sale of the item.

1 Now you're saying that they basically merged. And if
2 that's true, then let's go back to the original question. If
3 blockchain always depends on your maintaining it, what is the
4 difference between a crypto asset that is a security and a
5 crypto asset that isn't?

6 MS. FARER: So, Your Honor, the SEC did take this
7 position, and the court adopted it in *Telegram*, that the asset
8 itself embodies the investment contract. And we maintain a
9 consistent position with respect to that. And I think, you
10 know, even before that, in *SEC v. Joiner*, the particular -- the
11 drilling at issue that enhanced the value of the leaseholds was
12 not a contract between the -- was not a contract involving the
13 particular investor. The court said that the --

14 THE COURT: I'm not asking anymore the -- whether it
15 has to be a contractual promise, the second piece. What you're
16 saying is that there's no differentiation between the token and
17 the -- essentially, the managerial and entrepreneurial efforts
18 that are being offered along with it. And so -- and there's
19 always commonality because all the buyers -- the coins have the
20 same value, they can go up and down together, they're not
21 separate. So what is it then that differentiates the
22 investment contract from the asset?

23 MS. FARER: So, Your Honor, and just to clarify, my
24 reference to *Joiner* was the point about the court found that
25 that drilling was interwoven in the instrument at issue,

1 similar to the argument we're making here. And here the
2 difference is that, as we've highlighted, there is a common
3 enterprise where the economic inducements that are afforded by
4 the issuers, promoters, et cetera, that include promotions,
5 marketing, the efforts that they promise, the retention of
6 intellectual property, ongoing decisions, et cetera, the
7 expertise and experience of the team, the strategy and
8 structure of the activities, the development of the secondary
9 market, all of this gives rise to a reasonable expectation of
10 profits. The reasonable expectation of profits depends on
11 these ongoing efforts. That's what distinguishes it from an
12 ordinary asset. There is --

13 THE COURT: But the third *Howey* element is that the
14 buyer bought it because of that. The buyer has made a
15 reasonable determination that this is there. And I guess I
16 don't understand how you're saying that those expectations and
17 understandings are present at the moment of the resale.

18 MS. FARER: Because these efforts and promotions are
19 publicly and widely available. I will note, Your Honor, that
20 we're talking about this in the context of Binance, but -- and
21 BNB, but Binance's specifically and intentionally established
22 the breadth as the largest platform. Most people associated
23 with crypto know what Binance is, know what seizing is, and
24 know that BNB, their token, is at the heart of all of this.
25 And how do they know that? It is because through these

1 intentional efforts, these marketing -- the marketing as
2 alleged in the complaint that they undertake, the statements
3 that they make, et cetera.

4 Frankly, Your Honor, it's quite remarkable to us that
5 given these intentional efforts to establish this global
6 footprint and this expansive brand that Binance and CZ are now
7 trying to separate themselves from BNB that they continue to
8 offer and sell as an investment contract.

9 THE COURT: So you are linking, then, as they did in
10 the Southern District in the one case, the representations made
11 at the outset, you're saying those carry -- that at the outset
12 they were saying that they were going to do this and that
13 carries throughout.

14 MS. FARER: Those can be considered as part of it. I
15 think *Howey* and other cases have acknowledged that you need to
16 consider all of the facts and circumstances, both the -- those
17 from inception and carrying forward. And as to Your Honor's
18 point that, you know, depending on how things may or may not
19 change, that may impact the reasonableness analysis as to
20 whether there is a reasonable expectation of profits. But that
21 fact pattern is simply not here, Your Honor.

22 For both BNB and all of the third-party tokens there
23 are consistent representations about the investment opportunity
24 and the efforts that they are undertaking and how those efforts
25 drive the value of the particular tokens at issue. And as I

1 noted with respect to BNB itself, the investors know that BNB
2 is Binance's coin. It was called Binance's Coin through 2022.

3 And I would just clarify, Your Honor --

4 THE COURT: Well, as to the second *Howey* element, was
5 the nature of the commonality any more after real sales?
6 Where's pooling? Where's the -- that important aspect of it to
7 you?

8 MS. FARER: Yes, Your Honor. So we maintain that all
9 of the tests for commonality are met. As I discussed
10 previously with respect to the interdependency and for the
11 pooling, there is an initial pooling and the token itself
12 represents that pooled investment, and further purchases --
13 purchasers are buying the token to buy into that enterprise.

14 I will submit, Your Honor, the *Ripple* case --

15 THE COURT: I was going to ask you, why is that court
16 wrong about secondary sales?

17 MS. FARER: So the *Ripple* case does not address
18 secondary sales, Your Honor.

19 THE COURT: Puts it aside, basically.

20 MS. FARER: Well, the programmatic sales at issue on
21 *Ripple* were direct sales on the platform. They weren't
22 secondary sales. And the court made very clear in its opinion,
23 subsequent opinion, that it was specifically not addressing
24 secondary sales and they had made the determination, focusing
25 on the programmatic sales, based on a very developed record of

1 the facts and circumstances, expert testimony, et cetera. And
2 while we disagree with the court's analysis there because it
3 imposes a knowledge requirement and other factors that we don't
4 believe are mandated by *Howey*, we do want to make sure that the
5 Court is aware that it is not dealing with secondary sales.

6 In fact, Your Honor, in light of the focus on
7 secondary sales, we would offer -- there are a number of
8 opinions that address the point of secondary sales and find
9 that secondary sales can constitute an investment contract and
10 be the subject of a claim for Securities Act Section 5
11 liability. And that would be -- there was a recent case --
12 sorry, Your Honor, let me just pull my notes on this.

13 There is a recent arbitration case relating to the
14 *Terraform* where the purchases were made on the secondary
15 platform and the court found that there was an investment
16 contract at issue. The court didn't even need to reach the
17 fact that it was sold on the secondary market. But other cases
18 are consistent.

19 So there are two cases in the private sector
20 involving class action claims, the *Owen v. Elastos Foundation*,
21 an SDNY case, 2021, and a case relating to *Ripple*, actually,
22 where private investors who purchased tokens on the particular
23 platforms asserted a claim under Securities Act Section 12(a),
24 and under that provision it allows private investors
25 essentially to make a claim for --

1 THE COURT: Are those cited in your reply brief? Or
2 are you just telling me about them now? I'm not saying there's
3 anything wrong with that, I just want to know.

4 MS. FARER: They are not, Your Honor.

5 THE COURT: Then you need to file something that has
6 the cites.

7 MS. FARER: We will, Your Honor. We have copies --

8 THE COURT: You can just file something that says the
9 cases cited in court today are, and give me the cites.

10 MS. FARER: And we also have copies here for the
11 court and parties as well.

12 The point for those cases -- and we will file
13 something, Your Honor -- is that in both cases this exact issue
14 was raised as to whether secondary sales were at issue. And
15 the court rejected that argument and said that violations of
16 Securities Act Section 5 may occur as a result of initial or
17 secondary sales of securities. And we would submit that, you
18 know, the *Terraform* court, Judge Rakoff, he explained this
19 quite well. He doesn't make a distinction between primary and
20 secondary sales.

21 THE COURT: Let me talk about BUSD. If expectation
22 of profit alone isn't sufficient -- and it has to be an
23 expectation of profit based on managerial, entrepreneurial
24 efforts of others -- how does that apply to a digital asset
25 whose valued is tied to the U.S. dollar?

1 MS. FARER: Our claim at issue with respect to BUSD,
2 Your Honor, we're not alleging that the token itself is a
3 crypto asset security. We can quibble based on the facts as to
4 whether there is an actual pegging issue. But what we are
5 focusing on is that the claim provides -- was -- BUSD was
6 offered and sold as a package, as an opportunity for purchasers
7 to participate in these other profit-making programs. We
8 reference Binance earned and Binance rewards. And it's
9 advertised, "BUSD is now more rewarding." It offers you the
10 opportunity to participate in these programs, earn high rewards
11 of 20 to 30 percent APY.

12 And while defendants may complain about the way that
13 our claim is framed, this is the way that it was framed in the
14 *Terraform* case, for example, Your Honor, where we made a claim
15 based on USDT, which was also a stablecoin, and there Judge
16 Rakoff found that there was a security at issue because it --
17 the offer and sale of BUSD -- of USDT in that case provided
18 opportunities to be deployed in yield-generating programs like
19 the Anchor Protocol there.

20 It's no different than here, Your Honor. There is a
21 particular token and there are opportunities offered with the
22 token to be deployed and earn the profits.

23 THE COURT: Well, paragraph 321 alleges that the
24 proceeds from investors, purchasers were pooled. Binance
25 earned 50 percent of the returns on the pooled assets and it

1 used at least a portion of those returns to enable and promote
2 the Binance ecosystem. That's very different from what you
3 said about BNB. So how does that meet the investment contract
4 test?

5 MS. FARER: I'm not sure that it's different in what
6 we said about BNB. This is -- we're outlining here all of the
7 economic realities associated with BUSD and that purchasers
8 funds are pooled and a portion of the interest earned on that
9 is used by Binance and the trust company here to develop the
10 ecosystem associated with BUSD. But the fact remains, Your
11 Honor, that the offer and sale at issue provides opportunities
12 to deploy the particular token for profit-making endeavors.

13 THE COURT: You did allege that Binance offered BUSD
14 reward programs and other profit-making opportunities. Are
15 those the investment contracts that you're alleging, or are you
16 also alleging that the initial BUSD sale was an investment
17 contract?

18 MS. FARER: We're alleging that the BUSD is offered
19 as an opportunity to be deployed in these profit-making
20 endeavors is the investment contract.

21 THE COURT: So only when it was offered in connection
22 with that is it an investment contract? Otherwise it's not,
23 it's a commodity?

24 MS. FARER: The claim, for present purposes, focuses
25 on the deployment and the particular programs here, as well as

1 others that the BUSD could be deployed for. But we are
2 focusing on these here. And Judge Rakoff rejected --

3 THE COURT: Putting aside Judge Rakoff, I'm just
4 trying to figure out what you're alleging because I don't think
5 that's clear to me from reading the complaint and the briefs,
6 that you're not alleging that the initial sale of BUSD was an
7 investment contract and it's only these particular -- when it's
8 tied to these particular profit-making opportunities, is that
9 correct?

10 MS. FARER: Yes, Your Honor. It's when it's offered
11 and sold as an opportunity for performing in these
12 profit-making opportunities.

13 THE COURT: As opposed to BNB that was offered and
14 sold as one and remained as one in perpetuity because it's all
15 tied to what Binance said it was going to do?

16 MS. FARER: Yes, Your Honor. We're not focused on
17 the particular --

18 THE COURT: All right. Now, I'm not sure how simple
19 earn and BNB vault programs fit into the program either. It's
20 alleged that they're marketed as a program that pays interest
21 to an investor that will lend their assets to Binance for fixed
22 or flexible periods of time. And the interest rate was
23 established at the outset. So how is that the same as an
24 investment that earns returns solely due to the efforts of
25 others? The investor is earning interest on something it did.

1 It's saying, Here, you can have my assets and you have to pay
2 me interest. So where -- how does that fit the paradigm?

3 MS. FARER: The -- so the -- for these particular
4 programs, the assets that investors purchase are deployed into
5 these programs and they allow for Binance to use these for a
6 variety of endeavors and it is through those -- through the use
7 of those assets and their efforts that gives rise to the value
8 proposition and the expectation of profits. With respect to --

9 THE COURT: It's not the value proposition when they
10 have of yield, an annual percentage yield offered up at the
11 get-go.

12 MS. FARER: So the yield itself varies and it's
13 within Binance's sole discretion, and that's alleged in the
14 complaint. And it is -- the yield return is based on Binance's
15 efforts and how it deploys these funds. The rewards, in fact,
16 are distributed from Binance's own funds as described in the
17 introduction to the Simple Earn. They use their -- they pool
18 the assets and use their expertise to deploy them for a variety
19 of reasons and opportunities. It could include staking, it
20 could include loans, it could include use for their own
21 operational purposes. And it is, then, as a result of their
22 efforts in the deployment of these funds that give rise to the
23 profits. I mean, BNB vaults --

24 THE COURT: So they don't have to pay interest if
25 they don't want to?

1 MS. FARER: There is no obligation to pay interest,
2 Your Honor.

3 THE COURT: But what about the BAM staking program
4 that had the annual percentage yield at the outset?

5 MS. FARER: For all of these programs, Your Honor,
6 there is no guaranteed return. The allegations are that these
7 programs, the investment yield was in either Binance or BAM's
8 sole discretion. But courts like *Edwards* and *Rivera* have
9 evaluated fixed or variable returns and found that's not
10 determinative. What is determinative is whether the profits
11 are based on the efforts of others.

12 THE COURT: All right. Now, getting into the
13 third-party assets issue and whether they fall into the
14 definition of investment contracts. So, first, I just want to
15 get more clarity about why we have these 40 pages in the
16 complaint? And I'm a little concerned about the discovery and
17 mini trials that each of these are going to generate,
18 especially when the issuers aren't even parties to the lawsuit.

19 You stated clearly at the TRO hearing that the
20 securities laws are violated even if just one of Binance's
21 crypto assets is a security. And I understand that Counts 1
22 through 4 relate to the offer and sale of particular assets and
23 products without a registration statement as to them. But then
24 when you get to Count 5, Binance's failure to register as an
25 exchange; 6, Binance's failure to register as a broker-dealer;

1 and, 7, Binance's failure to register as a clearing agency, all
2 related to the Binance.com platform.

3 If I find that BNB was sold as a security, is that
4 all that's necessary for those counts, or does there need to be
5 more than that? And if there doesn't, then what is the point
6 of all the other assets? Is that just a warning shot to the
7 other issuers? I guess, do we need those for Counts 5, 6, and
8 7? Do you have to have more than one?

9 MS. FARER: Your Honor, BNB would be sufficient to
10 state our claim as the affecting sales solicitation, et cetera,
11 involving the crypto assets at issue. We have alleged the
12 other tokens because we maintain that this representative
13 sample is just that, it's a representative sample of another
14 crypto asset securities that are offered and traded on the
15 platform, and so that is relevant both to the scope of the
16 violation and the remedy at issue.

17 THE COURT: Well, if what you're saying is -- and
18 what you said isn't what the law is -- that each crypto asset
19 has to be looked at in terms of the totality of the
20 circumstances surrounding its original issuance and promotion
21 and what the statements are and the representations were and
22 what the understandings were, putting aside whether they're
23 contractual or not, with respect to that, how is -- what are
24 you saying? That anybody operating a platform has to do the
25 kind of discovery you did and look behind every coin out there

1 before they can sell it on their platform?

2 MS. FARER: Your Honor, regulated exchanges all the
3 time need to evaluate whether they are offering regulated
4 products and to satisfy their obligations under the laws. And
5 in this particular instance, with respect to these crypto asset
6 securities, the -- there are allegations that nothing has
7 changed, that there are ongoing representations and efforts
8 that give rise to a reasonable expectation of profits that make
9 clear that these are investment contracts as they are offered
10 and sold to investors.

11 THE COURT: Was there some point where, then, if
12 we're going on to all these, if I find that BNB is a security
13 or was sold as a security and, therefore, we have to address
14 these other issues about whether they're a broker-dealer,
15 whether there's failure to register as an exchange, and then
16 whether the U.S. entities have the same problems, how do we go
17 on and deal with all these third parties without the third
18 parties being part of the case?

19 MS. FARER: Your Honor, we can certainly work with
20 the Court and defense counsel to come up with an appropriate
21 discovery plan, but the extent of the violation which may turn
22 on the different crypto assets at issue is relevant to both the
23 scope of the violations and the remedies at issue. And so we
24 understand the practical implications that may be at issue here
25 and we are not saying we would pursue or need to evaluate the

1 hundreds of tokens on the particular -- on these platforms.

2 And, again, would work with the Court and the parties to come
3 up with a solution on how to address those issues.

4 THE COURT: Well, when you say that the token
5 represents the investment contract and then you say we've
6 devoted 40 pages and hundreds of allegations to all these other
7 points out there which are only representative, only the tip of
8 the iceberg, let's go back to my original question, are you --
9 it doesn't seem that you're saying that these are generally
10 commodities, and it's just how these particular ones were sold
11 that makes them investment contracts. It seems like you're
12 trying to say that all digital assets, at the end of the day,
13 have the earmarks of a security. And if you're not, where is
14 the boundary of what you're saying?

15 MS. FARER: We're not saying that, Your Honor.

16 THE COURT: I know you said you're not saying that,
17 but then you said some things that really seemed to slip-slide
18 into that in ways that I wasn't anticipating. So what is the
19 boundary of your definition? And don't just say *Howey*, which
20 is what, you know, was said to me, I thought almost glibly, at
21 the TRO hearing. There has to be a set of understanding --
22 people out in this industry who are buying them, selling them,
23 trading them, need to know what they're getting. And the
24 federal government has certainly taken the position that by and
25 large they're commodities, everybody who gets one gets the same

1 thing, they go up and down, price of everybody's goes up and
2 down the same.

3 A lot of what these platforms are doing, just making
4 sure their platforms work, seems somewhat more in the
5 ministerial side than the entrepreneurial side.

6 Now, what you were saying at the beginning with BNB,
7 these came out and they were issued and all of a sudden they're
8 saying we're using your money to bid BNB, we're going to make
9 the best platform with this, and so that's why this is the coin
10 you want, because you're investing in us and we're investing in
11 you. Are you saying that with respect to all these coins --
12 and if you're not saying it with respect to all these coins,
13 how are the issuers supposed to know when they cross the line?

14 MS. FARER: So the answer for these particular coins,
15 Your Honor, is yes, that at inception, similar to BNB, they
16 gave rise to a reasonable expectation of profits from the
17 development of their platform, or whatever the particular
18 protocol was. But our argument, Your Honor -- and this is
19 where the limiting principle comes in -- is that you
20 evaluate -- that these are -- there are ongoing efforts. You
21 look at the offer, the plan of inducement, how they're
22 distributed and you look at the totality of the circumstances.

23 I mean, Foreman has evaluated incorporation of
24 looking at whether they are solely for use. And if a token is
25 particularly solely for use, maybe that falls outside of the

1 analysis here.

2 You look at how many particular tokens purchasers
3 have to determine is this really for a use-case scenario or is
4 this for investment opportunities? I mean, I know that the
5 court may be frustrated that there's no bright line, but *Howey*
6 is intentionally the flexible test to look at all of the
7 economic realities at issue. And while the -- like
8 hypothetical bounds the defendants raise, argue are limitless,
9 that's just not what is at issue with these particular tokens.

10 And the same could be said for many of the others
11 that are on the platform, is that there are issuers, promoters,
12 et cetera, that are continually developing and maintaining that
13 technology, promising returns, et cetera. And these aren't
14 just use cases or whatever else, plain commodities. They have
15 no inherent use in and of itself, unless given that.

16 THE COURT: But what you said at the very beginning
17 was that ongoing relationship is inherent in blockchain,
18 period.

19 MS. FARER: Yes, Your Honor.

20 THE COURT: And so, it doesn't matter what -- with
21 that, it wouldn't matter what you said or did at the start and
22 what you committed to do and what the understanding was if they
23 always have to do something. But if they always have to do
24 something, doesn't that start to become more ministerial? You
25 have to validate it, you have to make it available for sale,

1 people have to find you on your platform. And aren't you
2 blending the distinction between the coin and the manner in
3 which the coin is sold?

4 MS. FARER: We don't believe so, Your Honor. And,
5 yes, while the underlying technology and that, the value is
6 inextricably intertwined with the technology and the value that
7 the other investors and issuers have is a factor for
8 consideration that is important here. It is the surrounding
9 economic realities that also are an important role. These are
10 offered and sold as investment opportunities. These issuers
11 are saying that we are going to -- our particular efforts are
12 driving the value.

13 I think perhaps maybe a particular example beyond BNB
14 would be helpful. BNB, obviously, we've talked about a lot and
15 that there are ongoing efforts and promises of profits,
16 et cetera, that we think satisfies the test, but if you look at
17 another example, Filecoin, for example, it was created by an
18 entity called Protocol Labs and it has a number of the
19 structure and characteristics that we just described. There
20 were rounds of sales for initial fundraising that were pooled
21 together and expressly to fund the development, including
22 rounds for advisors that were offered discounts and alining the
23 fortunes of the founders and initial investors. They are
24 affected pursuant to agreements for future tokens. And then
25 three years after these sales is when the public version of the

1 network launched.

2 So there was no value at the time that these were
3 purchased. Then there was a promise of a development of a
4 secondary market, which came into fruition in October 2020 for
5 .com and 2021 for Binance U.S. And as I explained, Your Honor,
6 the development of a secondary market is an important feature
7 for investors because they want to know that there is a value
8 proposition here at issue, that there is liquidity that they
9 could use, they could sell their token and get the profits
10 based on this value proposition.

11 There is a limited circulation supply with a
12 structured distribution that included not only the significant
13 retention of tokens by the owners and others as I've described
14 by vesting such that it was encouraging continued alignment
15 among all of these parties.

16 THE COURT: This whole discussion underscores the
17 point that it doesn't depend on the fact that the nature of
18 blockchain means that the issuer always has to do something.

19 MS. FARER: Yes, Your Honor. So to be clear, that is
20 one factor. And I don't want to overstate that factor. It is
21 an important factor, but it is one factor among many. And if I
22 may, Your Honor, because I, again, don't want defense counsel
23 to jump up here and say those were all presale, post -- presale
24 efforts. Since the launch there have been -- they've continued
25 to use funds from the sale of Filecoin, including funds that

1 they've gotten through the increase in value their own tokens.
2 They made various ongoing statements touting the expertise of
3 their team, ongoing efforts of development, and the investment
4 proposition that would induce continued investors in the market
5 wherever they purchased because these are widely disseminated
6 statements through, you know, web pages, social media,
7 et cetera, where they repeatedly reference how the success of
8 the ecosystem would reward investors and encourage initial
9 investors to increase success.

10 So, for example, they specifically acknowledge the
11 large scale --

12 THE COURT: It's either in your complaint or it's
13 not.

14 MS. FARER: It's in our complaint, Your Honor.

15 THE COURT: Then you don't need to read it to me.

16 I want to ask you a larger question and then I think
17 I need to get to whoever is going to be talking about
18 extraterritoriality and personal jurisdiction, although I think
19 you said at the beginning it wasn't going to be you. And that
20 is, is there any consistency between allegations in this case
21 and -- about the way to categorize Binance.com and BAM
22 Trading -- exchanges, brokers, clearing agencies -- with
23 allegations in the criminal case that they're operating as a
24 money exchange, or can those two things be side by side? And
25 is there any inconsistency between what's going on in the CFTC

1 case and this case?

2 MS. FARER: No, Your Honor. As the *McDonnell* case
3 explained, that different agencies have -- may have overlapping
4 jurisdiction as to particular products or regimes, and that's
5 exactly what's at issue here.

6 And I think what's also important to highlight is
7 that these different agencies and their regulatory framework
8 are focused on different things. FinCEN is focused on -- and
9 DOJ were focused on anti-money laundering and counter-terrorist
10 financing. The security laws are focused on the protection of
11 the investors, protection of the markets, ensuring full
12 disclosure. None of those interests are at issue in either the
13 DOJ FinCEN or CFTC settlement.

14 And I would note, Your Honor, that CFTC settlement
15 did not reference BUSD. There was reference to BUSD as a
16 commodity in the initial complaint. It was not identified
17 specifically for any of the claims and it was not referenced in
18 the settlement itself.

19 I would just like to clarify, Your Honor, with our
20 claim with respect to BUSD --

21 THE COURT: What commodity are they selling,
22 according to CFTC, if it's not BUSD? Because they were one in
23 the complaint.

24 MS. FARER: They were focused on different futures
25 and derivatives products, Your Honor.

1 THE COURT: But futures and derivatives based on
2 BUSD? It had to be based on something. You had to be doing a
3 future and derivative of the commodity in order for it to be
4 under their jurisdiction, correct?

5 MS. FARER: Yes, Your Honor. But the particular
6 futures and derivatives at issue in the CFTC complaint did not
7 turn on the USD. I don't want to speak for them, but our
8 review of the complaint is that --

9 THE COURT: It did initially, but --

10 MS. FARER: But that was not the underlying token as
11 part of the futures and derivatives in that case. But as Your
12 Honor recognized, that commodity could be the subject of an
13 investment contract, just as it could be issued with future
14 derivatives product that is governed and regulated by the CFTC.

15 As the former CFTC general counsel submitted his
16 letter in *Telegram*. The issue before these courts is not
17 whether something is a commodity, it's whether something is a
18 security, and the court has jurisdiction under the securities
19 laws.

20 Again, just to clarify our point on the offering of
21 the BUSD, I do want to make clear that is the initial offering
22 of BUSD, where it was coupled with the investment
23 opportunities. The package can't be artificially separated, as
24 courts from *Howey* through Judge Rakoff's *Terraform* decision
25 have made clear.

1 THE COURT: Okay. So it was the initial offer, but
2 you're saying the initial offer, part of the initial offer was
3 then you can use it for these programs?

4 MS. FARER: Correct, Your Honor. So I did just want
5 to clarify that the entire scheme at issue turns on the
6 promotion of these profit yield opportunities.

7 THE COURT: Okay. All right. I want to talk about
8 extraterritoriality and personal jurisdiction, and I guess the
9 larger question about proceeding in this manner, as opposed to
10 any regulatory or legislative manner, briefly. So whoever is
11 doing that can -- all right.

12 MR. SCARLATO: Your Honor, I'm handling
13 extraterritoriality. And if you have any questions about 17A I
14 can handle those.

15 THE COURT: Okay. How do I, consistent with
16 *Morrison*, have subject matter jurisdiction over 2017
17 allegations about something marketed to the whole world on the
18 internet from a company that was outside the United States?

19 MR. SCARLATO: Thank you, Your Honor. If I could
20 start by -- you mentioned subject matter jurisdiction. I just
21 want to clarify that since *Morrison*, I guess you're referring
22 to *Banner Fund*, and *Banner Fund* -- it was *Morrison* that
23 clarified it's really the substantive provisions. But I think
24 the analysis doesn't change.

25 THE COURT: Okay.

1 MR. SCARLATO: So Your Honor asked about the BNB
2 offering. The -- you're asking why it's a domestic application
3 of U.S. law to me, right? Is that the question?

4 THE COURT: Well, what is the purposeful direction at
5 the United States in the original ICO and how do those claims
6 survive *Morrison*?

7 MR. SCARLATO: Okay. Because it's based on the focus
8 of the provision at issue, which is Securities Act Section 5.
9 And since *Morrison* the test has been -- and it's been refined
10 up until this Supreme Court's recent decision in *Abitron* --
11 that the court must first identify the focus of a statute. And
12 once it identifies that focus, it looks to the facts alleged at
13 the motion to dismiss stage and determines whether the focus is
14 alleged to be this. Okay?

15 And so for specifically as to the BNB offering that
16 Your Honor references, the domestic action that's the focus of
17 Securities Act Section 5 is the offer, sale, or distribution of
18 securities into the United States. That is the focus of
19 Securities Act Section 5, which is consistent with -- Your
20 Honor cited the *Banner Fund* case which relies on cases we
21 discussed, including *Banque Paibas* and then the Regulation S,
22 which is SEC regulation regarding Securities Act Section 5.

23 All of that makes clear that the focus of Securities
24 Act Section 5 is not what the defendants argue, which are
25 transactions. That's not the focus. And we know that in part

1 not only because of the authorities I cite, Your Honor, but
2 because Section 5 covers not just responses, it covers
3 delivery. So you cannot -- it's a square peg in a round hole
4 to apply a transaction test to something that's broader than
5 that. And that's what the case is entirely consistent with.

6 So that's step one of this two-step test. This is
7 the first step of step two, if that makes any sense. So now
8 we've identified the focus of Section 5, Your Honor applies
9 that to the BNB offering. And as we allege, Binance offered
10 and sold BNB, BNB Vault, Simple Earn, and BUSD all to U.S.
11 investors, and we allege specific numbers. I can give the
12 Court the complaint number, if you like.

13 And that's the end of the analysis. You have the
14 focus, you have a domestic application of that focus, and you
15 can -- and from that we plausibly allege Securities Act Section
16 5 is a BNB offer.

17 You asked about the BNB offering, I went beyond that.
18 That also is the same analysis you would apply, Your Honor, to
19 the other securities I just mentioned.

20 THE COURT: One of the things you said is that the
21 SEC is good from a *Morrison* perspective because we're following
22 our Regulation S. But one of the ways the regulation defines
23 offshore is no offers are made to a person in the U.S. And,
24 so, if *Morrison* says it doesn't matter where the buyer lives,
25 the question is what you did in the U.S., how does the reg.

1 save you here?

2 MR. SCARLATO: I think Your Honor is conflating the
3 two tests. *Morrison* talks about the transactions in the
4 context of Exchange Act 10(b) and *Abitron* makes clear that
5 *Morrison's* holding is limited to that provision. If we're
6 looking at any other provision, right -- here we're talking
7 about Securities Act Section 5 -- you have to do a separate
8 analysis of the focus of that. So that's where the two paths
9 merge.

10 THE COURT: So are there any counts -- so your only
11 10b-5 -- your only count involving material and misleading
12 statements is the U.S. entities, Count 13.

13 MR. SCARLATO: Correct.

14 THE COURT: And, otherwise, everything else is under
15 a different provision.

16 MR. SCARLATO: It would either be Securities Act
17 Section 5 or the Exchange Act registration provision.

18 THE COURT: All right.

19 MR. SCARLATO: Which all have the same focus as I
20 just explained with respect to Securities Act Section 5. The
21 Exchange Act provisions regulate the security intermediary
22 services, rather than offers of sales of securities.

23 THE COURT: Okay. With respect to personal
24 jurisdiction over Mr. Zhao --

25 MR. SCARLATO: That's not my issue, Your Honor. I'm

1 doing 17A.

2 THE COURT: What other issue is your issue?

3 MR. SCARLATO: The 17A fraud charges. If you have
4 any questions about that, those claims against BAM, BAM
5 Management and BAM Trading.

6 THE COURT: I don't think so right now.

7 MR. SCARLATO: I'll be here, if you have any other
8 questions.

9 THE COURT: I'm going to leave at some point. You
10 can stay all day, if you like.

11 So you were not the one who was going to talk about
12 the regulation versus litigation, the whole "What are we doing
13 here" aspect of these?

14 MR. SCARLATO: No, Your Honor, I'm not.

15 THE COURT: Well, then you can just stay and think
16 about fraud.

17 All right. Who is coming next?

18 MR. SCARLATO: Thank you.

19 THE COURT: Thank you.

20 MR. MURPHY: Good afternoon, Your Honor. Emmett
21 Murphy of the SEC. Give me a minute to get settled here with
22 my unwieldy binders.

23 THE COURT: You may have more binders than you need
24 to answer the questions I'm going to ask you.

25 But I want to talk about personal jurisdiction

1 briefly. Counsel for the individual defendant was brief.

2 Now, does the law require that this be decided on a
3 claim-by-claim basis, or is one enough?

4 MR. MURPHY: I believe that it's right, that it does
5 have to be based -- that each claim -- that personal
6 jurisdiction is assessed on a claim-by-claim basis.

7 THE COURT: Now, as far as I can tell, with respect
8 to most of the claims, your allegation as to why we can reach
9 him is very similar, that he's controlling everything,
10 essentially. But if I agree that you need more than a
11 plausible allegation that he's controlling everything, have you
12 met that test that there are aspects about what he did
13 personally with respect to every claim for which he's charged
14 personally?

15 MR. MURPHY: Yes, Your Honor, except the control can
16 have different meanings depending on the defendant. Defense
17 counsel is making the argument that you cannot rely on the fact
18 that you've met your elements for the 20A control claim to
19 satisfy personal jurisdiction. We don't argue with that. But
20 the same underlying factual arguments can satisfy both the 20A
21 control claim and personal jurisdiction. And in this case it
22 makes perfect sense that they do.

23 These are two platforms. He was the founder of the
24 Binance.com platform. He ruled both platforms with an iron
25 fist. Those are our allegations. And the exchange clearing

1 agency, broker-dealer, it's all baked into this model that he
2 created. Defense counsel, I think, is zooming in with such
3 specificity. Sometimes when you zoom in close enough things
4 become blurry, I would submit. And here, stepping back, he
5 does not address the fact that when you're talking about
6 personal jurisdiction, it's a question of was Mr. Zhao put on
7 notice? Did he have meaningful contacts with the United States
8 such that he had notice that he might be brought to court here?

9 He doesn't talk about the fact that he hired a
10 consultant because of his exposure to the SEC's jurisdiction
11 and claims by the SEC under the securities laws. He makes no
12 mention of that. And it's hard no imagine a circumstance where
13 it's clear -- it's harder to think of allegations that are this
14 unusually detailed showing that he directed all of these
15 activities of BHL and BAM, keenly aware of his exposure to the
16 U.S. securities laws and created BAM with that in mind, to
17 insulate himself.

18 And the -- the specific arguments I would say are all
19 strawmen in the idea that we don't allege that he had personal
20 contact with U.S. investors, that's just not the standard
21 under -- in this kind of situation, or any that I'm aware of.
22 Defense counsel said that Mr. -- our allegation that Mr. Zhou
23 overruled the BAM CEO on the decision whether to list BNB on
24 the U.S. platform, despite her concerns that this would create
25 exposure under the securities laws, has nothing to do with the

1 claims.

2 We have an allegation that they're trading
3 securities, they are an exchange of securities, they're taking
4 customer assets. So I think you have the point. But I think
5 he's avoiding the bigger picture, the overwhelming allegations
6 showing that not only should he have been on notice that he
7 should be subject to the U.S. jurisdiction, but that he was in
8 fact.

9 THE COURT: All right. Are you the one who is going
10 to address the, kind of, first background big-picture question
11 that I asked the original arguing counsel?

12 MR. MURPHY: I think so. But if you don't mind just
13 asking so I'm sure to --

14 THE COURT: I guess the point was, where has the SEC
15 been? Does that matter if this was so obvious? And why is it
16 that if they're trying to achieve legislation, isn't that some
17 suggestion that there's something missing in the statute to
18 cover this? Why are we doing this on a coin-by-coin,
19 case-by-case, judge-by-judge litigation attack, which depends
20 on, you know, vagaries of the individual district in district
21 court? And the asset itself, as opposed to issuing a reg. that
22 tells everybody this is it, and then we have people who
23 challenge the reg. as being arbitrary and capricious or beyond
24 the scope of the statute, et cetera.

25 There's a lot of process-related attack, and all the

1 briefs spent pages on it. So I want to know what your answer
2 to all of that is.

3 MR. MURPHY: Your Honor, there's a lot there so I'm
4 going to try to address as much as I can based on the notes I
5 just made and then we'll walk back through what I missed. So
6 it seems with the complaint, where has the SEC been? And I
7 think baked into that is the SEC has made contradictory
8 statements and I just have to -- I have to disagree with the
9 premise of both of those. And I understand your challenging
10 the defendants in saying these things.

11 The SEC -- Binance started as part of a boom of ICOs
12 in 2017 and 2018. They solicited millions of dollars of
13 customer money in something that looks an awful lot like --
14 well, it's called an ICO. It looks an awful lot like an IPO,
15 of someone trying to solicit public investor assets. And
16 within a month of doing that, the SEC released guidance
17 pointing out the obvious: When you elicit customer money with
18 a promise of profits based on a common enterprise and your
19 efforts, you are subject to the securities laws.

20 The SEC didn't have to do that because, as the court
21 in *Kik* and the court in *Logan* said, the securities laws are not
22 unconstitutionally vague. You only need notice of the statute,
23 *Howey* is clear, and you don't need a regulator to reach out
24 specifically to remind you that you might be violating
25 securities laws; but they will remind you. Before they built

1 up this business on a critical mass, they were reminded. And
2 they this knew it. It's hard for them to say they -- it's hard
3 to believe that they didn't know it. And the facts are they
4 didn't -- they did know, that's why they hired a consultant,
5 that's why they built the business and the protections and the
6 evasions that they tried to.

7 On the question of regulation versus enforcement,
8 I'll just note, that's an argument that they made halfheartedly
9 during the TRO proceedings when we were here. I don't think
10 they really make that argument here because they would say we
11 don't have any power to make regulations. The -- as you know,
12 the SEC has discretion on whether to proceed through
13 enforcement or regulation. And when we're doing this, we're
14 thinking about the capital markets writ large, and there are
15 consequences to rewriting regs. to have carve-outs, to rewrite
16 regulations in ways that the crypto industry like.

17 There's really smart people at the SEC who figure out
18 rulemaking. I'm not sure we're thinking about rule-making
19 right now. But in the agency's discretion, have decided that
20 this -- to proceed on a fact-by-fact basis, on a case-by-case
21 basis, like we are here, is reasonable and the best way to
22 address facts as they are developing in this industry.

23 You mentioned gaps in the law. To the extent that
24 there are, I'm not sure if that's touching on major questions.
25 But we don't believe there are gaps in the law. We think *Howey*

1 is crystal clear and we think that there's a lot of courts and
2 decisions that you've cited that pointed to -- while you were
3 sitting here, Your Honor, who agree that *Howey* is clear.

4 I don't know if that addresses everything.

5 THE COURT: I think -- I thought the question needed
6 to be asked, given a lot that is in the background of the
7 defense briefs, they're probably going to stand up and remind
8 me what Mr. Genzer said again. And I remember. So, you know,
9 that's what they keep saying, you know, that this is new, this
10 came out of nowhere. I'm not sure I find that persuasive, but
11 it does seem like -- this action seems like a long time coming,
12 given when things started happening and 2023. And so there's a
13 question about, I guess, why.

14 MR. MURPHY: The SEC has brought over 100 actions
15 dealing with crypto assets. The defense counsel would argue
16 that *Howey* applies to crypto assets. So if it took too long --
17 investigations can take a long time. The SEC acts prudently as
18 they're going along.

19 But again, I would disagree with the premise that the
20 SEC has contradicted itself. I think if you look -- and I
21 won't repeat our briefs -- but if you look at every statement
22 they cite as a supposed contradiction, on closer examination it
23 just isn't.

24 On the gaps in the law, I would just direct you to
25 the letter that counsel apparently supervised and wrote in

1 *Telegram*. I think that answers everything on the issue between
2 FTC and SEC and that's the direction you should look, as
3 opposed to arguments that they discovered on the fly here.

4 With that, Your Honor, unless there is any --

5 THE COURT: If I think that the complaint plausibly
6 alleges that there is an asset, called commodity or not, that's
7 being marketed and sold with all the surrounding circumstances
8 as a security, do I have to even address whether that intrudes
9 on the jurisdiction of the CFTC?

10 MR. MURPHY: No, Your Honor. I would point to the
11 final sentences in counsel's letter in *Telegram* and I think
12 that gives the answer.

13 THE COURT: All right.

14 MR. MURPHY: *Howey* applies. If *Howey* applies, it's a
15 security and the SEC has authority to enforce.

16 THE COURT: All right. Thank you. Is there anything
17 somebody on this side of the room was planning to talk about
18 that I haven't asked them to talk about yet?

19 MR. TENREIRO: Your Honor, if I just may clarify.
20 Defense counsel has suggested they might do some rebuttal
21 points and we would like to reserve a couple minutes as well,
22 although I'm happy to do them now.

23 THE COURT: It's their motion. So you want to
24 reserve time -- you're not reserving time to rebut their
25 rebuttal. And their rebuttal, I can tell you -- it's 1:30 --

1 is going to be brief. It's not as if people haven't had a lot
2 of time to talk to me. So if I let them say anything, unless
3 they say something that they never said before and you must
4 address it, probably going to be done.

5 MR. TENREIRO: Okay.

6 THE COURT: I think I've been generous to everybody
7 as to time.

8 MR. TENREIRO: Absolutely, Your Honor. On
9 commonality, the Court asked for Court of Appeals authority on
10 that. I have the case, we can also --

11 THE COURT: Put them in writing.

12 MR. TENREIRO: Thank you.

13 THE COURT: All right. Now, I don't want to hear a
14 word that you said before. If there is something new that you
15 need to say, that you feel like you must say before you go
16 home, I will let each of you do it. I really don't think I
17 need to hear from counsel for Mr. Zhao on personal jurisdiction
18 again. And I don't want to hear anything more about intruding
19 on the authority of the CFTC again.

20 And I'm not sure really there's been that much with
21 respect to the U.S. entities that I need to hear again. But if
22 counsel for Binance want to address something and you feel like
23 there's something that you need to say that you have not yet
24 said in writing or in court, I'll give you no more than five
25 minutes to do it.

1 MR. MENDRO: Thank you, Your Honor. Jason Mendro for
2 BHL. And you have been very patient and I will be very brief.

3 Just to point back to Ms. Farer's arguments, you
4 asked: What is the boundary? And her response was: There's
5 no bright line. We think that's a problem because *Life Partner*
6 says that we should be looking to find a distinction between
7 securities and non-securities.

8 She says that there are ongoing efforts. But mostly
9 what we're talking about is promotion. Promotion is something
10 that every business does. And that also is not a distinction
11 between securities and non-securities. And there's no dispute
12 BNB exists separately from BHL, trades on an etherial block and
13 doesn't require ongoing efforts to have value. In fact, BHL
14 traded at its six-month high at the time the company was
15 entering into these resolutions. So there's not a direct
16 connection, there doesn't have to be.

17 The SEC has also suggested that statements last
18 February --

19 THE COURT REPORTER: Mr. Mendro.

20 MR. MENDRO: -- securities last forever. If that
21 were true and I could find a way to transfer a security to a
22 friend, it could mean that I'm engaged in the illegal sale of
23 securities based on statements that were made decades ago,
24 after the token had changed hands thousands of times. That
25 can't possibly be the test. And requiring privity is the

1 answer to that because if one party is contracting with another
2 party and they have an understanding, a meeting of the minds,
3 then you always know what the rules are.

4 If the contract could be assigned, then the contract
5 can be assigned. But everyone should be involved and know who
6 they're dealing with, and you don't have that on the SEC's
7 theory.

8 Counsel also mentioned the creation of a secondary
9 market. And I would just briefly note that the *Life Partners*
10 case specifically rejects that helping with resale of the
11 viatical settlement interest is sufficient. That's at page
12 546.

13 There was some discussion about direct sales other
14 than the offering of BNB, but I would submit that the complaint
15 does not plead any direct sales of BNB, other than the ICO.
16 Paragraphs 288 and 289 simply say that BNB was offered and then
17 offered on the exchange, which is the same sort of blind bid
18 ask transactions on the exchange that *Ripple* rejected because
19 it's impersonal and because the parties didn't know each other.

20 In paragraph 363, which is what they cited in their
21 briefing for this point, simply says that assets were sold, not
22 that BNB was.

23 There was brief mention of --

24 THE COURT: So that point goes to your statute of
25 limitations argument?

1 MR. MENDRO: It does, and also if there is a
2 distinction between resale and direct offerings, they haven't
3 shown that the direct offerings actually create the sort of
4 privity that we maintain is necessary to distinguish between
5 securities and non-securities because if it's done over the
6 exchange, nobody knows who they're dealing with. Nobody has
7 any reason to believe --

8 THE COURT: Okay.

9 MR. MENDRO: -- that their money is being pooled for
10 investment.

11 THE COURT: I heard that. Okay. All right.

12 MR. MENDRO: The SEC briefly mentioned payments to
13 employees which did not come up in my presentation. So I would
14 just note our briefs make this point: If there is an
15 investment by these employees within the meaning of securities
16 laws, again, *Teamsters versus Daniel* rejects the very same
17 argument, that an employee's work accounts is the investment.
18 In that case *Ripple* rejected the same argument. And the *Rivera*
19 case says if you have to give something up, then you run a risk
20 of loss.

21 We think all three of those cases show that the
22 payments to employees aren't enough. Paragraph 310 of the
23 SEC's complaint makes clear that these are payments to
24 high-performing employees. So there's no allegation that this
25 is all the compensation anyone got. These are bonuses. And

1 there's no allegation that there was an agreement between BHL
2 and any employees to receive BNB. And in fact, in paragraph
3 308 of the complaint the SEC alleges there's no restriction on
4 resale. So this isn't like a stock option that you get after
5 working for a few years. You get this as payment, as a bonus
6 and can use it any time you wish. That's alleged directly in
7 paragraph 308.

8 BUSD came up and the SEC said something that was a
9 little different from what I read from the complaint, in the
10 briefing. They said they're not alleging that BUSD is a
11 security independently. If that's where the SEC is, I think
12 it's important for the Court's ruling to make that
13 clarification too.

14 I look at Count 2 of the complaint and see an
15 allegation that BUSD in and of itself is a security, which is,
16 I think, what was said at one point and then taken back later.
17 If Count 2 is about programs --

18 THE COURT: What it says is what it says and I will
19 look at it and it either says it or it doesn't. I mean, I
20 certainly -- the question has been raised and the language of
21 the complaint is going to control and there's no point arguing
22 about what we remember it said.

23 MR. MENDRO: That's fair, Your Honor. I just would
24 point out that Count 3 specifically makes allegations about
25 programs. And I don't understand the distinction between 2 and

1 3, if 2 is also about the programs.

2 But, the response, even if the Court disagrees with
3 me on that, is very similar to the response I gave you about
4 the two programs that are addressed in Count 3. This is --
5 there's no allegation of a real risk, which the Supreme Court
6 says must be given adequate weight in the *Meridian Bank* case.
7 This is just -- the allegations are completely consistent with
8 a deposit that can be withdrawn at any time. And there's been
9 no dispute about that. Those deposits that the complaint
10 alleges are deposits that BHL is using to divest on its own
11 behalf. Paragraphs 317 and 320 make that clear. It's not
12 using the deposits to generate returns that go to the
13 investors, it's, instead, just paying them for the use of its
14 funds.

15 Paragraph 324 actually describes it as being like a
16 savings account without a deposit. So there's not even
17 necessarily a choice being made to use the savings feature.

18 So, Your Honor, I think that that addresses all of
19 the things separate from what I said before. I don't want to
20 repeat it. I do have citations from our brief where the CFTC
21 displacement point was raised, if you would like to know where.

22 Thank you, Your Honor. I'm very grateful for your
23 time, unless you have other questions.

24 THE COURT: I don't think so.

25 MR. MENDRO: Thank you.

1 MR DAVIS: Sorry, BAM defense did not get a chance to
2 address the staking program in Count 4. Can I spend 60 seconds
3 and give you a couple points?

4 THE COURT: Sixty seconds. Give me points you didn't
5 make before.

6 MR DAVIS: I haven't discussed staking, Your Honor.

7 THE COURT: Okay. I asked about it. Gave everybody
8 a chance to talk about it. You wanted to talk about something
9 else, go ahead.

10 MR DAVIS: I misunderstood the question, Your Honor.
11 I'll be very brief.

12 Page 546 of the *Life Partners* case talks about the
13 need for post-purchase entrepreneurial activity, can
14 meaningfully affect the profitability of the investment.
15 That's not met. Here most of the work that's being done is by
16 the staking protocol itself. And most of the activities
17 alleged in the staking section are pre-purchase activities by
18 BAM.

19 THE COURT: All right.

20 MR DAVIS: The only post-purchase activity is
21 paragraph 350, which is pooling, which is a ministerial action.
22 If it's not a ministerial action, it's not the type of
23 entrepreneurial activity that overwhelms what the stake in
24 protocol does itself.

25 Thank you, Your Honor.

1 THE COURT: All right. I do have one question of the
2 SEC. When I started down the statute of limitations argument,
3 the answer was: Well, they're still selling BNB. If I'm just
4 looking at the ICO portion involving BNB, what is the answer to
5 the statute of limitations issue?

6 MS. FARER: Your Honor, we would maintain that the
7 ICO is not time-barred for the reasons we said previously.

8 THE COURT: Okay. And why not?

9 MS. FARER: Because during -- the statute of
10 limitations did not start to run because the defendant was not
11 present in the United States for purposes of service of
12 process.

13 THE COURT: Okay. All right. Thank you.

14 MR. GREGORY: Your Honor, may I respond briefly to
15 that point?

16 THE COURT: Okay.

17 MS. FARER: Your Honor, we would also just note that
18 there is the injunctive relief point, that there is the longer
19 statute of limitations.

20 THE COURT: All right.

21 MS. FARER: And, Your Honor, if I just may, I don't
22 think we --

23 THE COURT: I think they already addressed that
24 point.

25 MS. FARER: They did, Your Honor.

1 With respect to staking, I don't think that we
2 specifically addressed that as well, but if I just may, one
3 minute, Your Honor, if that.

4 THE COURT: All right.

5 MS. FARER: I would just note for the staking
6 program, as well as the other investment programs, all
7 defendants challenge the entrepreneurial and managerial
8 efforts. And we would note, at a minimum, Your Honor, it's a
9 fact intense question that the court in *Life Partners*, in
10 evaluating whether something was ministerial or not, had to
11 evaluate all of the evidence before it as to really determine
12 what impacted the return and the reward. And here, Your Honor,
13 we would respectfully submit that --

14 THE COURT: I understand there's a difference between
15 summary judgment and a motion to dismiss. I know that I went
16 through staking, I went through every single asset that was
17 alleged to be a security. So I'm pretty sure I asked both
18 sides about the staking program. And I do have questions about
19 the vault and the staking and whether those qualify, but it
20 depends on what's been alleged.

21 MS. FARER: My apologies, Your Honor. When you asked
22 about staking, I thought you were just talking about the
23 technology.

24 THE COURT: In general. I talked about it when I
25 talked about BNB and I asked you why your allegation -- could

1 it be staked and didn't hear the answer. But then I think I
2 specifically asked about the BAM staking program.

3 MS. FARER: If you did, Your Honor, I don't recall.

4 THE COURT: If I skipped it, I skipped it. But
5 you've answered it.

6 MS. FARER: We would just note that the efforts that
7 defense counsel specifically referenced, the pooling of assets
8 really impacts whether a validator is elected to be a part of
9 that process which impacts the return, as well as the
10 maintenance of the infrastructure and technology, the,
11 quote/unquote, up time is critical to -- again, to the
12 selection.

13 So these efforts, we would maintain, satisfy the test
14 under *Life Partners* that defendants rely so heavily upon.

15 THE COURT: Okay. Thank you.

16 All right. You're the last one to speak. It better
17 be really, really good if you want to walk out of here in a
18 cloud of glory. Go ahead.

19 MR. GREGORY: I can do it in one minute, Your Honor.

20 THE COURT: Fabulous.

21 MR. GREGORY: On this point about service of process
22 and the limitations period --

23 THE COURT REPORTER: Sir, you're going to have to
24 slow down.

25 MR. GREGORY: Okay. Thank you. That case is from

1 the Southern District of New York. It's an opinion by Judge
2 Sullivan, he specifically rejected the link they're asking you
3 to draw here between service of process and the running of the
4 limitations period. In that case the defendant was subject to
5 service of process and the court said that doesn't matter, what
6 matters under the statute is physical presence. And, actually,
7 this wouldn't matter anyway because the burden-shifting, even
8 at the motion to dismiss stage, for them to show that an
9 exception to a limitations period applies, they have the burden
10 to allege all of the facts to support it. That's the *Firestone*
11 case and the *Sharp* case that the SEC itself cites in its brief.

12 THE COURT: All right. Thank you.

13 MR. GREGORY: Thank you, Your Honor.

14 THE COURT: I appreciate everyone's patience this
15 morning. I appreciate everyone's attempt to be responsive to
16 the questions and dealing with the fact that there were a lot
17 of them. And I will take this matter, or complicated set of
18 matters, and all the circumstances that surround them under
19 advisement.

20 Thank you.

21 * * *

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 25th day of January, 2024

Janice E. Dickman, CRR, CMR, CCR
Official Court Reporter
Room 6523
333 Constitution Avenue, N.W.
Washington, D.C. 20001

	2020 [2] - 35:2, 111:4 2021 [4] - 31:2, 37:6, 98:21, 111:5 2022 [1] - 97:2 2023 [1] - 125:12 2024 [2] - 1:6, 138:8 20549 [1] - 1:16 20A [2] - 120:18, 120:20 216 [1] - 63:6 22 [1] - 1:6 223 [1] - 45:13 224 [1] - 45:13 23-1599 [1] - 3:2 23-cv-1599 [1] - 1:4 232 [1] - 45:14 233 [1] - 45:14 24 [1] - 41:17 2462 [1] - 73:6 25th [1] - 138:8 288 [2] - 71:25, 129:16 289 [1] - 129:16 299 [1] - 72:3	500 [1] - 26:9 545 [2] - 28:4, 28:24 546 [2] - 129:12, 133:12 548 [1] - 30:5 555 [1] - 2:7	73:17, 96:15 acknowledges [1] - 63:19 across-the-board [1] - 89:11 act [20] - 61:8, 81:6 Act [20] - 5:12, 33:20, 33:21, 38:20, 58:22, 98:10, 98:23, 99:16, 116:8, 116:17, 116:19, 116:22, 116:24, 117:15, 118:4, 118:7, 118:16, 118:17, 118:20, 118:21 action [8] - 3:2, 62:6, 64:19, 98:20, 116:16, 125:11, 133:21, 133:22 Action [1] - 1:3 actions [3] - 13:8, 36:20, 125:14 active [5] - 47:2, 55:8, 59:8, 62:11, 63:1 actively [1] - 63:4 activities [12] - 16:8, 29:2, 30:15, 30:16, 48:16, 53:17, 61:16, 63:17, 95:8, 121:15, 133:16, 133:17 activity [9] - 10:15, 15:23, 16:11, 16:13, 51:14, 87:9, 133:13, 133:20, 133:23 Acts [1] - 71:22 acts [3] - 52:11, 70:18, 125:17 actual [4] - 52:16, 57:12, 85:22, 100:4 add [3] - 29:25, 30:2, 34:5 added [1] - 73:6 adding [1] - 68:7 addition [3] - 45:3, 72:15, 77:9 additional [1] - 49:6 address [16] - 19:11, 27:7, 38:14, 46:13, 97:17, 98:8, 106:13, 107:3, 121:5, 122:10, 123:4, 124:22, 126:8, 127:4, 127:22, 133:2 addressed [6] - 9:16, 43:1, 64:25, 132:4, 134:23, 135:2 addresses [3] - 42:12, 125:4, 132:18 addressing [2] - 4:24, 97:23 adequate [1] - 132:6 adhere [1] - 6:14 administrative [1] -
'30s [1] - 12:19			
1		6	
1 [1] - 104:21 10(b) [5] - 40:5, 40:6, 40:15, 40:18, 118:4 100 [3] - 1:16, 1:19, 125:14 1000 [1] - 2:7 10004 [1] - 1:19 102 [1] - 31:1 1050 [1] - 1:23 10:00 [1] - 1:7 10b-5 [1] - 118:11 11 [1] - 58:13 118 [1] - 63:2 11:37 [1] - 65:11 11:53 [1] - 65:11 11th [1] - 2:7 12(a) [1] - 98:23 12(b)(2) [1] - 65:5 12(b)(6) [1] - 36:17 129 [1] - 63:14 13 [2] - 70:12, 118:12 131 [1] - 63:19 133 [1] - 63:20 134-page [1] - 26:9 140 [1] - 63:2 15 [1] - 55:7 166 [1] - 62:18 17A [3] - 115:13, 119:1, 119:3 1919 [1] - 2:3 1940s [1] - 80:10 1:30 [1] - 126:25		6 [2] - 104:25, 105:7 60 [1] - 133:2 6523 [2] - 2:10, 138:13	
		7	
		7 [2] - 105:1, 105:8 70 [1] - 62:13	
		8	
		800 [1] - 2:3	
		9	
		9.5 [1] - 31:1 91 [1] - 45:10	
	3	A	
	3 [4] - 27:5, 131:24, 132:1, 132:4 30 [1] - 100:11 300 [1] - 1:23 308 [2] - 131:3, 131:7 310 [1] - 130:22 317 [1] - 132:11 320 [1] - 132:11 321 [1] - 100:23 324 [1] - 132:15 327 [1] - 26:21 329 [1] - 26:21 331 [1] - 26:21 333 [2] - 2:11, 138:13 349 [1] - 7:16 350 [1] - 133:21 363 [1] - 129:20	a.m [3] - 1:7, 65:11 aback [1] - 4:14 Abid [2] - 2:5, 4:2 ability [5] - 33:21, 48:24, 53:4, 73:7, 138:7 Abitron [6] - 39:7, 39:18, 44:11, 116:10, 118:4 able [4] - 32:9, 60:14, 62:10, 89:1 absence [1] - 60:5 absolutely [2] - 4:19, 127:8 accept [2] - 73:19, 91:17 acceptance [3] - 7:15, 10:7, 85:8 accepted [1] - 77:15 according [1] - 113:22 account [3] - 62:11, 63:7, 132:16 accounts [5] - 39:12, 62:16, 62:21, 62:24, 130:17 accurate [1] - 138:5 achieve [2] - 72:7, 122:16 acknowledge [1] - 112:10 acknowledged [2] -	
	2		
2 [4] - 131:14, 131:17, 131:25, 132:1 20 [2] - 31:6, 100:11 20-some-odd [1] - 54:19 20001 [2] - 2:11, 138:14 20004 [1] - 2:7 20006 [1] - 2:4 20036 [1] - 1:23 2013 [1] - 71:13 2017 [10] - 34:21, 35:8, 35:11, 37:7, 40:23, 41:3, 41:7, 71:12, 115:16, 123:12 2018 [2] - 37:4, 123:12 2019 [2] - 34:25, 35:1 202-354-3267 [1] - 2:12			
	4		
	4 [2] - 104:22, 133:2 40 [2] - 104:15, 107:6 45 [1] - 50:3		
	5		
	5 [18] - 40:17, 40:18, 71:22, 98:10, 99:16, 104:24, 105:7, 116:8, 116:17, 116:19, 116:22, 116:24, 117:2, 117:8, 117:16, 118:7, 118:17, 118:20 50 [1] - 100:25		

75:9
admitted [1] - 61:18
adopt [2] - 41:22, 49:9
adopted [5] - 8:8,
 49:11, 74:23, 76:10,
 94:7
adopting [2] - 48:25
adoption [2] - 88:16,
 88:19
adopts [1] - 47:18
advance [1] - 84:24
advertise [1] - 17:13
advertised [1] - 100:9
advertising [3] -
 17:20, 18:24, 90:16
advised [1] - 34:23
advisement [1] -
 137:19
advisors [1] - 110:22
Advocates [1] - 82:10
affect [6] - 28:18,
 32:23, 32:24, 87:11,
 88:6, 133:14
affected [2] - 40:7,
 110:24
affecting [1] - 105:10
affects [2] - 89:8, 89:9
affiliates [1] - 61:18
afforded [1] - 95:3
afternoon [3] - 65:14,
 65:15, 119:20
agencies [6] - 13:16,
 58:10, 62:4, 112:22,
 113:3, 113:7
agency [9] - 32:20,
 36:19, 37:14, 38:9,
 57:25, 60:25, 71:5,
 105:1, 121:1
agency's [1] - 124:19
agents [1] - 61:20
ago [5] - 9:25, 32:15,
 53:6, 80:4, 128:23
agree [20] - 5:17, 10:1,
 11:15, 12:25, 15:8,
 15:9, 23:6, 25:21,
 26:15, 30:9, 37:2, 51:2,
 53:20, 60:7, 64:11,
 66:10, 66:23, 77:17,
 120:10, 125:3
agreed [2] - 60:17,
 78:15
agreement [5] - 50:2,
 50:24, 79:12, 81:17,
 131:1
agreements [3] -
 31:22, 49:16, 110:24
agrees [2] - 24:2,
 83:17
ahead [7] - 13:22,
 14:25, 22:6, 22:13,

36:2, 133:9, 136:18
al [2] - 1:7, 3:3
alignment [1] - 111:14
alining [1] - 110:22
alive [2] - 61:4, 61:5
allegation [16] - 16:6,
 23:16, 43:12, 63:2,
 63:23, 67:1, 72:3,
 120:8, 120:11, 121:22,
 122:2, 130:24, 131:1,
 131:15, 132:5, 135:25
allegations [43] - 23:3,
 23:15, 23:24, 26:9,
 26:12, 27:1, 29:5, 35:3,
 39:12, 40:5, 40:9, 45:9,
 49:25, 51:10, 51:12,
 51:13, 54:25, 55:11,
 64:10, 64:12, 64:14,
 73:21, 77:12, 81:16,
 81:24, 82:16, 83:3,
 87:25, 88:9, 88:18,
 91:8, 93:7, 104:6,
 106:6, 107:6, 112:20,
 112:23, 115:17,
 120:25, 121:13, 122:5,
 131:24, 132:7
allege [15] - 22:2, 43:4,
 43:11, 44:3, 62:6,
 63:14, 64:5, 64:6, 83:8,
 101:13, 117:9, 117:11,
 117:15, 121:19, 137:10
alleged [28] - 13:24,
 15:11, 22:1, 26:5, 39:9,
 40:2, 41:5, 42:24,
 68:19, 69:18, 77:4,
 77:14, 78:8, 83:14,
 85:14, 89:2, 93:7,
 93:14, 96:2, 102:20,
 103:13, 105:11,
 116:12, 116:14, 131:6,
 133:17, 135:17, 135:20
alleges [13] - 30:25,
 41:1, 41:6, 41:18,
 67:16, 70:16, 71:23,
 72:4, 85:18, 100:23,
 126:6, 131:3, 132:10
alleging [10] - 16:14,
 24:25, 62:10, 100:2,
 101:15, 101:16,
 101:18, 102:4, 102:6,
 131:10
allow [2] - 64:20,
 103:5
allows [1] - 98:24
alluded [1] - 61:6
almost [3] - 32:15,
 61:12, 107:20
alone [8] - 30:15, 31:1,
 64:13, 66:6, 69:11,
 69:14, 80:19, 99:22

amici [5] - 4:8, 5:10,
 12:12, 76:23, 82:9
amicus [1] - 85:25
AML [1] - 61:10
AMY [1] - 1:10
analogy [1] - 18:25
analysis [20] - 6:1,
 25:13, 25:15, 44:25,
 45:16, 59:6, 60:2,
 67:20, 73:13, 73:20,
 75:15, 80:12, 80:13,
 96:19, 98:2, 109:1,
 115:24, 117:13,
 117:18, 118:8
analyze [2] - 58:13,
 81:4
analyzed [1] - 86:5
analyzing [2] - 80:12,
 80:15
Anchor [1] - 100:19
annual [2] - 103:10,
 104:4
annuity [1] - 17:21
answer [20] - 11:11,
 11:25, 15:1, 16:4, 27:4,
 30:3, 32:5, 32:9, 51:4,
 51:22, 51:24, 86:2,
 108:14, 119:24, 123:1,
 126:12, 129:1, 134:3,
 134:4, 136:1
answered [1] - 136:5
answers [1] - 126:1
anti [2] - 47:7, 113:9
anti-manipulation [1]
 - 47:7
anti-money [1] - 113:9
anticipate [1] - 25:9
anticipating [1] -
 107:18
antifraud [1] - 46:21
anyway [2] - 18:24,
 137:7
apart [1] - 84:6
apologies [1] - 135:21
apologize [1] - 8:17
Appeals [1] - 127:9
appearance [1] - 50:4
appearing [1] - 89:5
application [6] - 39:1,
 39:3, 39:19, 81:6,
 116:2, 117:14
applies [7] - 15:21,
 33:10, 117:8, 125:16,
 126:14, 137:9
apply [11] - 13:22,
 19:6, 37:10, 38:22,
 40:9, 41:9, 41:10,
 99:24, 117:4, 117:18
applying [3] - 7:3,
 39:17, 45:1

appreciate [6] - 4:7,
 5:13, 15:13, 65:17,
 137:14, 137:15
approach [1] - 77:17
approaching [1] - 3:7
appropriate [2] -
 85:17, 106:20
approved [1] - 63:24
apps [1] - 68:7
APY [1] - 100:11
arbitrage [1] - 12:8
arbitrary [1] - 122:23
arbitration [1] - 98:13
Arden [1] - 86:9
arguably [1] - 81:18
argue [7] - 20:7, 20:9,
 81:2, 109:8, 116:24,
 120:19, 125:15
argued [5] - 20:19,
 38:21, 39:10, 79:9,
 89:3
argues [1] - 33:24
arguing [7] - 9:3, 35:5,
 38:18, 55:21, 57:7,
 122:11, 131:21
argument [48] - 5:5,
 5:13, 9:2, 10:2, 15:7,
 15:8, 20:13, 23:18,
 24:16, 24:23, 25:2,
 27:13, 27:14, 33:19,
 33:24, 35:9, 36:18,
 36:24, 37:20, 38:8,
 40:21, 42:5, 42:20,
 46:13, 50:6, 53:13,
 54:21, 54:22, 57:19,
 57:22, 57:23, 60:23,
 61:4, 71:9, 76:22,
 81:17, 84:24, 91:25,
 95:1, 99:15, 108:18,
 120:17, 124:8, 124:10,
 129:25, 130:17,
 130:18, 134:2
arguments [20] - 3:12,
 12:11, 19:9, 19:10,
 20:11, 23:18, 36:9,
 38:8, 38:16, 40:1,
 44:23, 47:18, 60:20,
 65:5, 80:5, 80:10,
 120:20, 121:18, 126:3,
 128:3
arise [1] - 30:11
arising [1] - 6:16
arming [1] - 64:19
arms [1] - 32:1
arrangement [2] -
 15:5, 79:18
arrangements [3] -
 49:15, 54:17, 82:1
article [1] - 55:16
artificially [1] - 114:23

aside [4] - 20:13, 97:19, 102:3, 105:22
aspect [3] - 20:25, 97:6, 119:13
aspects [2] - 52:15, 120:12
asserted [4] - 41:7, 49:22, 49:23, 98:23
assertion [2] - 63:5, 63:12
assertions [3] - 62:25, 64:7, 64:16
assessed [1] - 120:6
asset [56] - 14:13, 14:14, 15:4, 15:10, 16:14, 16:15, 16:18, 16:23, 17:25, 18:2, 18:10, 18:19, 22:9, 24:12, 25:13, 31:13, 31:20, 31:21, 47:13, 47:14, 47:21, 47:24, 51:21, 52:1, 52:6, 52:8, 53:25, 56:9, 56:14, 58:4, 58:6, 66:2, 66:3, 66:17, 66:25, 70:11, 71:1, 77:7, 77:21, 82:11, 84:11, 93:12, 94:4, 94:5, 94:7, 94:22, 95:12, 99:24, 100:3, 105:14, 105:18, 106:5, 122:21, 126:6, 135:16
asset's [1] - 78:17
assets [52] - 12:19, 14:1, 15:4, 17:12, 21:4, 21:5, 22:16, 24:8, 24:9, 27:15, 34:25, 35:23, 45:11, 46:9, 46:18, 47:4, 48:23, 49:6, 49:7, 51:11, 52:14, 54:15, 54:16, 55:2, 60:17, 67:18, 69:16, 70:4, 73:25, 75:20, 82:24, 83:25, 84:23, 100:25, 102:21, 103:1, 103:4, 103:7, 103:18, 104:13, 104:21, 104:22, 105:6, 105:11, 106:22, 107:12, 122:4, 123:15, 125:15, 125:16, 129:21, 136:7
assigned [6] - 29:18, 34:6, 42:16, 55:23, 129:4, 129:5
assignment [2] - 24:2, 24:3
associated [7] - 78:7, 86:12, 86:18, 90:25, 95:22, 101:7, 101:10
assume [1] - 4:11
assuming [3] - 44:24,

50:25, 51:1
assumption [1] - 39:22
attack [2] - 122:19, 122:25
attempt [1] - 137:15
attention [5] - 9:21, 25:25, 26:1, 34:23, 50:5
attract [2] - 84:13, 87:23
attribute [2] - 14:11, 63:14
attributes [1] - 55:1
authorities [2] - 59:2, 117:1
authority [18] - 13:5, 13:16, 21:23, 31:12, 33:13, 33:15, 33:20, 37:13, 37:15, 47:7, 59:3, 62:15, 62:20, 62:23, 87:6, 126:15, 127:9, 127:19
authorized [1] - 73:18
available [7] - 59:22, 62:1, 62:3, 63:8, 88:10, 95:19, 109:25
Avenue [4] - 1:23, 2:3, 2:11, 138:13
avoid [1] - 35:4
avoiding [1] - 122:5
aware [7] - 9:23, 37:3, 38:1, 42:11, 98:5, 121:15, 121:21
awful [2] - 123:13, 123:14

B

Babies [1] - 80:7
background [3] - 49:17, 122:10, 125:6
bad [1] - 8:2
Bahamas [2] - 90:23, 91:2
baked [3] - 90:7, 121:1, 123:7
Baker [2] - 2:6, 4:4
BAM [23] - 2:1, 3:23, 3:25, 13:18, 45:1, 45:13, 55:22, 64:19, 70:12, 70:13, 70:22, 83:22, 104:3, 112:21, 119:4, 119:5, 121:15, 121:16, 121:23, 133:1, 133:18, 136:2
BAM's [6] - 45:7, 45:11, 52:7, 56:5, 57:20, 104:7
bank [4] - 39:12,

62:10, 62:15, 62:22
Bank [2] - 61:8, 132:6
Banner [10] - 6:14, 6:22, 12:2, 40:5, 40:8, 45:23, 74:8, 115:22, 116:20
Banque [1] - 116:21
bar [2] - 20:3, 69:4
barred [6] - 20:10, 29:9, 71:14, 71:19, 72:20, 134:7
bars [1] - 69:7
baseball [4] - 16:25, 18:20, 18:22, 18:24
based [30] - 5:13, 8:22, 25:7, 25:13, 28:12, 49:5, 67:3, 67:10, 68:9, 69:23, 70:10, 82:22, 87:9, 88:15, 92:25, 93:1, 97:25, 99:23, 100:3, 100:15, 103:14, 104:11, 111:10, 114:1, 114:2, 116:7, 120:5, 123:4, 123:18, 128:23
bases [1] - 49:25
basic [1] - 57:14
basis [10] - 6:18, 28:5, 35:5, 49:9, 61:14, 61:15, 120:3, 120:6, 124:20, 124:21
Beanie [1] - 80:7
bear [5] - 27:24, 36:17, 67:6, 82:25, 85:3
bears [1] - 36:18
beat [3] - 43:18, 43:25, 44:2
become [3] - 31:14, 109:24, 121:4
becomes [1] - 31:10
BEFORE [1] - 1:10
began [1] - 40:22
beginning [7] - 21:14, 22:17, 90:8, 91:10, 108:6, 109:16, 112:19
begins [1] - 47:4
behalf [8] - 3:9, 3:17, 3:23, 3:24, 4:3, 64:25, 65:2, 132:11
behind [1] - 105:25
benefit [2] - 41:12, 77:7
BERMAN [1] - 1:10
best [4] - 76:24, 108:9, 124:21, 138:7
better [7] - 17:8, 33:19, 55:14, 57:2, 74:17, 136:16
between [34] - 5:9, 10:8, 13:3, 13:7, 21:20,

31:15, 31:18, 31:20, 42:3, 47:1, 47:13, 47:19, 49:15, 51:9, 54:6, 66:11, 75:1, 93:22, 94:4, 94:12, 94:16, 99:19, 110:2, 112:20, 112:25, 126:1, 128:6, 128:11, 130:2, 130:4, 131:1, 131:25, 135:14, 137:3
beyond [7] - 38:22, 64:14, 72:17, 90:21, 110:13, 117:17, 122:23
BHL [24] - 3:18, 14:10, 18:2, 18:3, 18:4, 18:8, 18:10, 19:24, 20:23, 23:13, 23:19, 31:1, 38:12, 41:2, 41:6, 41:18, 59:9, 121:15, 128:2, 128:12, 128:13, 131:1, 132:10
BHL's [1] - 23:12
bid [2] - 108:8, 129:17
bids [1] - 45:14
big [1] - 122:10
big-picture [1] - 122:10
bigger [1] - 122:5
bill [1] - 4:4
Binance [58] - 1:6, 1:21, 3:3, 3:17, 16:7, 17:4, 29:6, 38:10, 40:23, 55:12, 55:17, 55:18, 60:17, 61:17, 62:19, 62:20, 62:22, 63:10, 68:22, 71:24, 72:4, 72:12, 79:5, 81:21, 82:8, 82:17, 83:20, 83:21, 84:11, 84:17, 84:23, 87:16, 87:18, 88:9, 89:20, 90:10, 91:13, 91:20, 91:21, 92:5, 92:12, 95:20, 95:23, 96:6, 100:8, 100:24, 101:2, 101:9, 101:13, 102:15, 102:21, 103:5, 104:7, 111:5, 117:9, 123:11, 127:22
Binance's [11] - 82:15, 95:21, 97:2, 103:13, 103:14, 103:16, 104:20, 104:24, 104:25, 105:1
Binance.com [5] - 44:7, 72:6, 105:2, 112:21, 120:24
binders [2] - 119:22, 119:23
binding [2] - 10:2,

32:17
binds [1] - 78:16
bit [2] - 44:17, 80:1
bitcoin [4] - 49:4,
 49:5, 55:6, 55:8
Bitcoin [2] - 57:3,
 74:19
bizarre [1] - 41:21
bleed [1] - 46:18
blending [1] - 110:2
blind [1] - 129:17
block [1] - 128:12
blockchain [24] - 18:1,
 18:2, 18:3, 18:8, 18:11,
 23:9, 23:12, 23:13,
 67:17, 68:2, 68:5, 68:6,
 68:7, 68:8, 68:18,
 68:19, 83:3, 93:11,
 93:13, 94:3, 109:17,
 111:18
blue [3] - 5:12, 8:5,
 8:24
blurry [1] - 121:4
BNB [94] - 13:25,
 14:14, 14:19, 16:13,
 17:3, 18:7, 19:6, 19:8,
 19:14, 20:19, 20:22,
 21:8, 23:16, 25:5, 26:6,
 27:5, 27:15, 27:20,
 29:4, 29:9, 35:11, 41:3,
 55:11, 55:19, 57:2,
 64:20, 67:17, 68:22,
 69:18, 71:22, 71:25,
 72:4, 72:16, 73:25,
 75:5, 75:18, 78:10,
 81:13, 82:3, 82:8,
 82:14, 82:17, 84:4,
 84:13, 85:11, 85:19,
 87:9, 87:11, 88:1, 90:2,
 90:5, 90:12, 90:18,
 90:20, 91:4, 91:14,
 91:16, 93:15, 95:21,
 95:24, 96:7, 96:22,
 97:1, 101:3, 101:6,
 102:13, 102:19,
 103:23, 105:3, 105:9,
 106:12, 108:6, 108:8,
 108:15, 110:13,
 110:14, 116:1, 116:15,
 117:9, 117:10, 117:16,
 117:17, 121:23,
 128:12, 129:14,
 129:15, 129:16,
 129:22, 131:2, 134:3,
 134:4, 135:25
board [1] - 89:11
bonds [2] - 54:19,
 80:18
bonus [2] - 85:9,
 131:5

bonuses [1] - 130:25
boom [1] - 123:11
bootstrap [1] - 39:21
border [1] - 44:12
borders [3] - 38:22,
 43:21, 44:13
Bosenman [1] - 2:2
bother [2] - 11:17,
 26:1
bought [2] - 64:21,
 95:14
bound [5] - 6:19, 7:1,
 7:4, 79:5
boundaries [1] - 67:22
boundary [5] - 40:25,
 86:1, 107:14, 107:19,
 128:4
bounds [1] - 109:8
Bowdoin [1] - 86:8
brand [1] - 96:6
breaches [1] - 49:2
breadth [1] - 95:22
break [1] - 65:9
brief [24] - 20:1, 20:19,
 20:20, 29:25, 36:8,
 42:25, 43:12, 43:14,
 46:16, 46:20, 57:7,
 75:24, 76:5, 79:10,
 89:3, 91:25, 99:1,
 120:1, 127:1, 128:2,
 129:23, 132:20,
 133:11, 137:11
briefed [1] - 66:18
briefing [3] - 4:8,
 129:21, 131:10
briefly [5] - 115:10,
 120:1, 129:9, 130:12,
 134:14
briefs [9] - 20:9,
 46:11, 57:9, 85:25,
 102:5, 123:1, 125:7,
 125:21, 130:14
bright [2] - 109:5,
 128:5
bring [6] - 36:20,
 43:14, 50:4, 56:6,
 59:16, 65:5
bringing [2] - 36:3,
 90:14
brings [1] - 59:13
British [1] - 91:2
broad [8] - 8:2, 12:16,
 13:1, 13:2, 58:9, 74:4,
 74:16, 75:25
broader [3] - 11:17,
 79:22, 117:4
broadly [2] - 35:10,
 35:12
broker [4] - 60:25,
 104:25, 106:14, 121:1

broker-dealer [3] -
 104:25, 106:14, 121:1
brokers [1] - 112:22
brought [6] - 46:21,
 49:21, 59:9, 64:2,
 121:8, 125:14
Brown [1] - 58:25
build [2] - 55:14, 76:24
building [1] - 18:10
built [4] - 82:12, 82:13,
 123:25, 124:5
built-in [2] - 82:12,
 82:13
bulk [1] - 3:12
bulletin [1] - 86:22
burden [4] - 44:10,
 63:25, 137:7, 137:9
burden-shifting [1] -
 137:7
burn [3] - 82:8, 82:19,
 87:20
BUSD [35] - 20:15,
 24:13, 24:15, 24:17,
 24:20, 24:22, 24:25,
 50:2, 51:1, 55:20,
 59:10, 67:17, 99:21,
 100:1, 100:5, 100:9,
 100:17, 101:7, 101:10,
 101:13, 101:16,
 101:18, 102:1, 102:6,
 113:15, 113:20,
 113:22, 114:2, 114:21,
 114:22, 117:10, 131:8,
 131:10, 131:15
business [8] - 16:15,
 16:17, 16:18, 16:23,
 49:18, 124:1, 124:5,
 128:10
buy [8] - 18:5, 18:15,
 18:19, 18:20, 28:8,
 33:22, 91:13, 97:13
buyer [12] - 21:5,
 25:18, 25:19, 27:16,
 83:10, 92:4, 92:8,
 92:12, 95:14, 117:24
buyers [5] - 39:2,
 45:10, 68:13, 76:25,
 94:19
buying [10] - 20:24,
 22:21, 35:9, 57:2, 57:3,
 76:18, 92:20, 97:13,
 107:22
buys [6] - 7:24, 23:16,
 66:7, 68:1, 89:9, 93:5

C

calculus [2] - 60:19,
 84:7
cannot [8] - 23:10,

25:2, 30:10, 41:16,
 63:22, 80:24, 117:3,
 120:17
capacious [1] - 41:23
capital [3] - 53:17,
 92:18, 124:14
capricious [1] -
 122:23
Carbon [1] - 53:2
carbon [5] - 53:2,
 53:5, 53:7, 54:12, 55:3
card [1] - 32:6
cards [7] - 17:1, 18:20,
 18:22, 18:24, 46:19,
 80:8
careful [2] - 24:11,
 25:6
carries [4] - 80:19,
 92:7, 93:2, 96:13
carry [1] - 96:11
carrying [1] - 96:17
Caruso [1] - 85:5
carve [1] - 124:15
carve-outs [1] -
 124:15
case [114] - 5:24, 6:22,
 7:4, 7:6, 7:8, 8:12, 9:2,
 9:9, 9:10, 9:22, 10:3,
 10:11, 10:12, 10:22,
 11:23, 12:5, 12:15,
 18:9, 19:1, 19:2, 20:7,
 22:20, 22:25, 23:11,
 23:25, 24:15, 25:16,
 26:23, 26:24, 27:25,
 28:4, 28:5, 31:10,
 32:17, 35:1, 37:11,
 38:11, 38:13, 42:2,
 42:8, 42:9, 42:11,
 42:13, 45:23, 45:24,
 46:3, 46:23, 47:2,
 49:14, 50:23, 53:17,
 53:20, 55:10, 59:7,
 59:9, 59:11, 59:12,
 59:14, 59:24, 60:3,
 60:16, 64:1, 66:13,
 74:19, 75:10, 75:12,
 78:9, 80:1, 80:4, 85:4,
 85:5, 89:14, 89:25,
 90:23, 91:11, 96:10,
 97:14, 97:17, 98:11,
 98:13, 98:21, 100:14,
 100:17, 106:18, 109:3,
 112:20, 112:23, 113:1,
 113:2, 114:11, 116:20,
 117:5, 120:21, 122:19,
 124:20, 127:10,
 129:10, 130:18,
 130:19, 132:6, 133:12,
 136:25, 137:4, 137:11
case-by-case [2] -

122:19, 124:20
cases [53] - 8:16, 8:19, 8:25, 9:25, 10:5, 10:9, 10:12, 10:25, 11:3, 11:24, 12:20, 12:23, 14:17, 17:24, 21:10, 22:19, 29:24, 31:19, 33:7, 42:6, 42:7, 47:13, 48:4, 49:14, 49:22, 57:9, 59:12, 59:17, 62:9, 66:18, 67:15, 69:7, 71:13, 73:3, 74:10, 76:12, 78:20, 79:25, 81:8, 86:7, 87:2, 96:15, 98:17, 98:19, 99:9, 99:12, 99:13, 109:14, 116:20, 130:21
Castel [1] - 46:25
categories [2] - 67:14, 80:16
categorize [1] - 112:21
causes [3] - 15:3, 62:6, 64:18
Cayman [1] - 44:4
CCR [1] - 138:12
CEO [2] - 64:19, 121:23
certain [6] - 27:10, 52:12, 52:13, 53:17, 91:18
certainly [7] - 13:12, 32:13, 36:11, 75:18, 106:19, 107:24, 131:20
CERTIFICATE [1] - 138:2
certified [1] - 49:8
certify [1] - 138:4
cetera [14] - 69:7, 69:19, 79:12, 86:24, 95:4, 95:6, 96:3, 98:1, 105:10, 109:12, 109:13, 110:16, 112:7, 122:24
CFTC [49] - 13:6, 38:11, 46:9, 46:24, 47:1, 47:6, 47:21, 49:6, 49:8, 49:10, 49:17, 49:20, 49:21, 49:22, 49:23, 50:1, 50:11, 50:14, 53:1, 53:6, 54:2, 54:14, 54:15, 54:25, 56:6, 56:10, 56:18, 56:20, 57:24, 58:18, 58:19, 58:23, 59:8, 59:11, 59:23, 59:25, 60:1, 60:16, 112:25, 113:13, 113:14, 113:22, 114:6, 114:14, 114:15, 126:9, 127:19,

132:20
CFTC's [7] - 46:21, 47:3, 47:20, 49:2, 56:5, 58:15, 60:8
CFTC-regulated [1] - 49:8
Chair [1] - 37:6
chairman [1] - 32:4
challenge [2] - 122:23, 135:7
challenging [1] - 123:9
chance [3] - 57:2, 133:1, 133:8
Chaney [1] - 36:19
change [7] - 15:3, 32:11, 53:5, 60:18, 73:13, 96:19, 115:24
changed [6] - 14:7, 15:2, 73:11, 93:4, 106:7, 128:24
changes [1] - 84:7
Changpeng [1] - 2:5
character [2] - 80:21, 89:13
characteristics [2] - 52:6, 110:19
characterization [1] - 67:4
characterize [1] - 24:14
charge [1] - 54:3
charged [1] - 120:13
charges [1] - 119:3
checked [1] - 51:11
Choice [1] - 82:10
choice [4] - 85:14, 85:15, 85:16, 132:17
choose [1] - 36:20
chose [2] - 56:10, 62:4
Circuit [21] - 6:13, 6:23, 7:8, 7:11, 7:21, 8:12, 8:13, 8:14, 8:18, 8:19, 21:18, 32:17, 45:17, 46:7, 59:19, 60:3, 64:12, 74:7, 74:16, 86:8
circuit [16] - 6:20, 8:10, 9:22, 10:9, 11:4, 12:23, 21:19, 27:23, 45:5, 74:13, 74:18, 75:16, 76:1, 76:6, 76:9, 76:10
Circuit's [1] - 11:1
circuits [3] - 74:19, 74:21, 74:25
circulation [1] - 111:11
circumstance [6] - 22:16, 23:21, 23:23,

24:1, 92:10, 121:12
circumstances [27] - 19:3, 21:16, 21:25, 22:1, 23:1, 24:6, 24:7, 29:24, 58:11, 66:13, 66:20, 67:5, 79:1, 80:15, 81:10, 84:10, 84:23, 86:16, 89:16, 91:12, 91:19, 96:16, 98:1, 105:20, 108:22, 126:7, 137:18
circumvent [1] - 63:23
citations [1] - 132:20
cite [5] - 62:13, 74:10, 76:4, 117:1, 125:22
cited [10] - 8:13, 8:25, 42:8, 46:22, 91:11, 99:1, 99:9, 116:20, 125:2, 129:20
cites [5] - 7:5, 8:11, 99:6, 99:9, 137:11
civil [1] - 3:2
Civil [1] - 1:3
claim [34] - 27:5, 27:18, 39:24, 42:21, 43:3, 58:10, 59:2, 62:14, 67:7, 70:9, 71:22, 72:14, 72:15, 72:17, 72:19, 83:23, 98:10, 98:23, 98:25, 100:1, 100:5, 100:13, 100:14, 101:24, 105:10, 113:20, 120:3, 120:5, 120:6, 120:13, 120:18, 120:21
claim-by-claim [2] - 120:3, 120:6
claims [17] - 21:8, 27:20, 35:10, 41:5, 47:17, 56:6, 62:8, 64:2, 64:21, 71:18, 98:20, 113:17, 116:5, 119:4, 120:8, 121:11, 122:1
clarification [1] - 131:13
clarified [1] - 115:23
clarify [9] - 72:12, 89:22, 94:23, 97:3, 113:19, 114:20, 115:5, 115:21, 126:19
clarity [2] - 4:7, 104:15
class [2] - 13:8, 98:20
classes [1] - 77:24
Clause [1] - 37:18
clear [34] - 6:8, 7:21, 11:2, 12:14, 14:20, 17:23, 20:1, 32:18, 33:12, 38:12, 38:23, 39:8, 40:12, 40:19, 44:3, 45:4, 45:9, 47:3,

47:6, 93:21, 97:22, 102:5, 106:9, 111:19, 114:21, 114:25, 116:23, 118:4, 121:13, 123:23, 125:1, 125:3, 130:23, 132:11
clearest [2] - 20:8, 20:9
clearing [4] - 60:25, 105:1, 112:22, 120:25
clearly [7] - 12:8, 28:7, 39:17, 40:15, 42:9, 47:12, 104:19
client [3] - 14:10, 39:9, 55:22
client's [1] - 38:1
climate [1] - 53:5
close [1] - 121:3
closed [2] - 35:15, 35:17
closer [1] - 125:22
closest [1] - 62:18
closing [1] - 20:18
cloud [1] - 136:18
CMR [1] - 138:12
code [2] - 66:19, 88:20
coin [23] - 17:3, 17:6, 19:2, 24:17, 31:24, 33:2, 40:22, 40:23, 51:15, 55:12, 66:15, 69:21, 88:3, 88:10, 92:7, 92:13, 97:2, 105:25, 108:9, 110:2, 110:3, 122:18
Coin [1] - 97:2
coin-by-coin [1] - 122:18
Coinbase [4] - 35:21, 36:2, 49:24, 59:12
coins [11] - 15:20, 17:9, 18:15, 27:18, 55:14, 66:11, 78:2, 94:19, 108:11, 108:12, 108:14
colleague [3] - 3:19, 4:4, 20:12
colleagues [5] - 3:11, 3:13, 65:20, 71:8, 74:17
collectibles [1] - 16:25
COLUMBIA [1] - 1:1
com [2] - 79:2, 111:5
combinations [1] - 82:1
combined [1] - 6:11
comfortable [2] - 55:16, 56:3
coming [4] - 55:16, 57:11, 119:17, 125:11
comments [1] - 53:7

<p>Commission [5] - 1:3, 1:15, 1:18, 3:3, 3:10</p> <p>Commission's [1] - 48:24</p> <p>commitment [2] - 28:24, 79:11</p> <p>commitments [2] - 28:25, 48:12</p> <p>committed [1] - 109:22</p> <p>commodities [18] - 13:3, 13:8, 13:15, 31:16, 46:19, 47:7, 47:10, 51:3, 52:19, 53:22, 54:6, 54:11, 69:3, 76:17, 107:10, 107:25, 109:14</p> <p>Commodities [2] - 48:23, 86:10</p> <p>Commodity [1] - 58:22</p> <p>commodity [24] - 32:10, 32:11, 49:22, 49:23, 50:3, 50:21, 51:1, 51:16, 51:21, 51:22, 54:13, 54:14, 56:10, 58:4, 59:10, 76:17, 89:21, 101:23, 113:16, 113:21, 114:3, 114:12, 114:17, 126:6</p> <p>common [13] - 6:17, 16:1, 21:2, 21:3, 22:11, 47:21, 68:10, 74:2, 74:24, 79:15, 79:22, 95:2, 123:18</p> <p>commonality [17] - 45:5, 45:17, 45:20, 74:4, 74:5, 74:8, 74:12, 74:20, 74:21, 75:25, 76:7, 76:11, 94:19, 97:5, 97:9, 127:9</p> <p>commonly [1] - 80:23</p> <p>commonplace [1] - 81:7</p> <p>communications [1] - 86:22</p> <p>companies [1] - 63:18</p> <p>company [11] - 16:14, 16:20, 17:25, 42:4, 45:15, 85:12, 92:1, 92:2, 101:9, 115:18, 128:14</p> <p>company's [1] - 34:22</p> <p>compare [1] - 62:12</p> <p>compensation [4] - 84:23, 85:1, 85:13, 130:25</p> <p>complain [1] - 100:12</p> <p>complaint [58] - 26:9, 26:20, 29:5, 30:25, 35:3, 41:2, 43:11, 44:5,</p>	<p>45:10, 55:1, 55:11, 61:11, 61:21, 62:2, 62:5, 62:12, 62:14, 62:17, 63:3, 64:14, 67:1, 67:16, 68:20, 70:2, 70:3, 71:23, 73:22, 77:5, 77:14, 81:15, 81:24, 84:15, 85:18, 87:25, 89:3, 93:7, 93:15, 96:2, 102:5, 103:14, 104:16, 112:12, 112:14, 113:16, 113:23, 114:6, 114:8, 117:12, 123:6, 126:5, 129:14, 130:23, 131:3, 131:9, 131:14, 131:21, 132:9</p> <p>complete [1] - 138:6</p> <p>completely [4] - 24:7, 37:9, 70:2, 132:7</p> <p>complex [1] - 67:12</p> <p>complicated [2] - 54:23, 137:17</p> <p>comply [2] - 32:19, 34:24</p> <p>concealed [1] - 63:10</p> <p>concede [1] - 20:6</p> <p>conceded [3] - 38:11, 61:3, 61:15</p> <p>concedes [1] - 62:22</p> <p>concept [1] - 78:14</p> <p>concern [1] - 47:8</p> <p>concerned [1] - 104:16</p> <p>concerns [2] - 37:19, 121:24</p> <p>concession [1] - 61:22</p> <p>conclude [1] - 56:4</p> <p>concluded [1] - 28:9</p> <p>concludes [1] - 31:9</p> <p>conclusion [2] - 7:22, 76:3</p> <p>conclusionary [1] - 64:7</p> <p>conclusory [3] - 26:13, 63:12, 64:16</p> <p>concurrent [1] - 58:1</p> <p>conduct [10] - 18:6, 36:22, 39:8, 39:11, 39:23, 43:20, 44:11, 61:23, 63:16</p> <p>conducted [1] - 62:2</p> <p>conference [1] - 50:13</p> <p>conflating [1] - 118:2</p> <p>conflict [2] - 47:15, 48:23</p> <p>conflicting [1] - 36:16</p> <p>Congress [6] - 36:10, 41:22, 42:13, 47:6,</p>	<p>79:16, 80:9</p> <p>Congress's [1] - 38:4</p> <p>congressional [1] - 33:13</p> <p>Congressional [1] - 12:15</p> <p>Connecticut [1] - 1:23</p> <p>connection [5] - 64:1, 82:14, 91:3, 101:21, 128:16</p> <p>consensus [1] - 83:2</p> <p>consent [4] - 50:2, 50:14, 50:24, 60:16</p> <p>consequence [2] - 34:1, 62:5</p> <p>consequences [3] - 32:16, 39:13, 124:15</p> <p>consider [2] - 70:9, 96:16</p> <p>consideration [8] - 10:7, 25:16, 25:22, 26:25, 27:2, 67:25, 85:10, 110:8</p> <p>considered [2] - 80:10, 96:14</p> <p>considering [1] - 9:5</p> <p>considers [1] - 59:1</p> <p>consistency [1] - 112:20</p> <p>consistent [14] - 5:22, 10:2, 10:5, 24:7, 27:1, 27:2, 89:14, 94:9, 96:23, 98:18, 115:15, 116:19, 117:5, 132:7</p> <p>consists [1] - 74:8</p> <p>constitute [1] - 98:9</p> <p>constitutes [2] - 31:23, 138:5</p> <p>Constitution [2] - 2:11, 138:13</p> <p>construct [1] - 74:25</p> <p>consultant [2] - 121:10, 124:4</p> <p>consumers [1] - 17:2</p> <p>contact [1] - 121:20</p> <p>contacts [1] - 121:7</p> <p>contemplated [2] - 12:19, 91:9</p> <p>contents [2] - 63:24, 81:10</p> <p>context [7] - 6:9, 32:19, 40:18, 59:6, 80:1, 95:20, 118:4</p> <p>continually [2] - 68:6, 109:12</p> <p>continue [1] - 96:7</p> <p>continued [5] - 40:23, 93:18, 111:14, 111:24, 112:4</p> <p>continues [1] - 87:16</p>	<p>continuing [5] - 41:7, 43:9, 90:9, 91:18, 91:20</p> <p>continuingly [1] - 93:10</p> <p>continuously [1] - 88:6</p> <p>contract [136] - 5:14, 5:19, 6:2, 6:3, 6:12, 6:15, 6:24, 7:2, 7:3, 7:7, 7:15, 7:22, 7:25, 8:21, 8:22, 9:4, 9:6, 9:7, 9:12, 9:20, 9:23, 9:24, 10:4, 10:6, 10:14, 10:21, 10:22, 10:23, 11:7, 11:10, 11:11, 11:14, 11:17, 11:18, 11:22, 12:8, 12:13, 12:24, 13:13, 13:22, 15:5, 15:7, 15:11, 15:21, 20:14, 20:16, 21:24, 22:3, 22:9, 22:24, 23:20, 23:23, 24:1, 24:2, 24:5, 24:14, 29:10, 31:10, 31:21, 33:25, 44:24, 47:17, 48:1, 48:17, 49:1, 51:3, 51:22, 52:18, 53:10, 53:21, 54:18, 56:12, 56:15, 56:19, 57:8, 57:12, 58:7, 67:2, 71:18, 71:19, 72:1, 78:16, 79:4, 79:15, 80:22, 81:2, 81:5, 81:14, 82:12, 83:8, 84:24, 85:22, 86:11, 86:25, 87:1, 87:3, 87:4, 89:10, 89:12, 89:13, 89:24, 92:4, 92:15, 92:22, 93:4, 93:21, 93:23, 94:8, 94:12, 94:22, 96:8, 98:9, 98:16, 101:3, 101:17, 101:20, 101:22, 102:7, 107:5, 114:13, 129:4</p> <p>contracting [1] - 129:1</p> <p>contracts [35] - 5:11, 5:24, 5:25, 6:1, 6:10, 7:9, 9:1, 9:6, 11:9, 12:6, 21:21, 23:8, 26:6, 26:14, 27:12, 33:17, 33:19, 48:20, 48:22, 66:12, 66:14, 70:11, 78:18, 79:22, 81:16, 81:25, 86:16, 86:17, 86:18, 92:9, 101:15, 104:14, 106:9, 107:11</p> <p>contractual [20] - 5:15, 5:21, 6:11, 7:13, 7:19, 8:20, 9:3, 9:12,</p>
--	--	---	---

11:24, 25:24, 28:16,
48:12, 49:14, 49:16,
54:17, 78:15, 79:10,
79:18, 94:15, 105:23
contradicted [1] -
125:20
contradiction [1] -
125:22
contradictory [1] -
123:7
contrary [1] - 36:10
contrast [1] - 90:22
contribute [1] - 63:16
contribution [1] -
92:18
control [10] - 55:4,
60:18, 62:8, 64:10,
64:12, 88:12, 120:15,
120:18, 120:21, 131:21
controlling [2] - 120:9,
120:11
controls [2] - 8:4,
63:23
conveyed [3] - 7:10,
48:14, 48:15
cooperate [1] - 36:1
copies [2] - 99:7,
99:10
cops [1] - 43:18
core [1] - 55:10
corporate [2] - 41:13,
42:14
corporation [3] -
41:21, 42:11, 42:12
correct [19] - 15:19,
15:24, 21:23, 23:14,
42:23, 48:5, 48:6, 51:1,
64:12, 67:11, 69:13,
72:11, 75:11, 84:21,
88:8, 102:9, 114:4,
115:4, 118:13
coterminous [1] - 47:1
cotton [1] - 54:7
counsel [31] - 3:6,
3:10, 3:13, 3:15, 3:19,
3:24, 5:2, 13:18, 38:14,
44:23, 46:24, 57:6,
72:21, 75:11, 86:7,
86:15, 106:20, 111:22,
114:15, 120:1, 120:17,
121:2, 121:22, 122:11,
125:15, 125:25,
126:20, 127:17,
127:22, 129:8, 136:7
Counsel [1] - 46:23
counsel's [2] - 87:13,
126:11
count [4] - 22:13,
61:8, 70:3, 118:11
Count [9] - 27:5,

70:12, 104:24, 118:12,
131:14, 131:17,
131:24, 132:4, 133:2
counter [1] - 113:9
counter-terrorist [1] -
113:9
countries [5] - 39:21,
43:19, 43:20, 44:2,
44:12
country [3] - 33:1,
41:20, 44:10
country's [1] - 43:25
counts [4] - 34:7,
41:21, 105:4, 118:10
Counts [2] - 104:21,
105:7
couple [7] - 22:4, 35:7,
42:19, 55:4, 58:21,
126:21, 133:3
coupled [2] - 55:12,
114:22
course [6] - 6:21,
8:24, 36:19, 38:3,
41:14, 61:12
COURT [260] - 1:1,
3:14, 3:21, 4:1, 4:6,
5:9, 6:5, 6:7, 6:13,
7:23, 8:15, 9:8, 10:11,
11:6, 11:13, 12:2,
12:10, 13:14, 13:19,
14:5, 14:8, 14:11,
14:22, 14:25, 15:7,
15:13, 15:19, 16:3,
17:2, 17:16, 18:12,
18:23, 19:12, 19:18,
20:5, 20:11, 20:13,
20:21, 20:25, 21:10,
22:6, 22:13, 22:23,
24:10, 24:21, 25:5,
25:23, 26:11, 26:16,
26:19, 27:8, 27:21,
28:1, 28:15, 28:21,
29:4, 29:13, 29:16,
30:4, 30:7, 30:13,
30:20, 30:23, 31:17,
32:8, 32:22, 33:15,
34:3, 34:5, 34:11,
34:13, 34:15, 35:17,
36:8, 37:1, 37:13,
37:22, 38:7, 38:15,
38:20, 38:25, 40:4,
40:20, 41:10, 42:2,
42:16, 43:8, 43:22,
43:24, 44:15, 44:19,
44:22, 45:19, 46:8,
47:9, 47:25, 48:4, 48:8,
48:10, 48:19, 49:11,
50:1, 50:18, 51:15,
51:20, 52:4, 52:14,
52:18, 53:11, 53:19,

54:5, 55:10, 55:23,
56:7, 56:17, 56:22,
57:24, 58:17, 60:4,
60:10, 60:22, 61:14,
64:4, 64:9, 64:24, 65:7,
65:12, 65:15, 65:22,
66:5, 66:10, 66:22,
67:8, 67:16, 68:13,
69:2, 69:11, 69:25,
70:7, 70:12, 70:16,
70:23, 71:3, 71:10,
71:14, 71:17, 72:9,
73:24, 74:7, 75:17,
75:22, 76:15, 77:17,
78:1, 78:13, 79:5, 81:8,
82:3, 82:7, 82:23, 83:5,
83:9, 84:2, 84:17,
84:22, 85:12, 85:21,
87:5, 88:3, 88:9, 89:7,
90:1, 90:6, 91:5, 91:24,
93:19, 94:14, 95:13,
96:9, 97:4, 97:15,
97:19, 99:1, 99:5, 99:8,
99:21, 100:23, 101:13,
101:21, 102:3, 102:13,
102:18, 103:9, 103:24,
104:3, 104:12, 105:17,
106:11, 107:4, 107:16,
109:16, 109:20,
111:16, 112:12,
112:15, 113:21, 114:1,
114:9, 115:1, 115:7,
115:15, 115:25, 116:4,
117:20, 118:10,
118:14, 118:18,
118:23, 119:2, 119:6,
119:9, 119:15, 119:19,
119:23, 120:7, 122:9,
122:14, 125:5, 126:5,
126:13, 126:16,
126:23, 127:6, 127:11,
127:13, 128:19,
129:24, 130:8, 130:11,
131:18, 132:24, 133:4,
133:7, 133:19, 134:1,
134:8, 134:13, 134:16,
134:20, 134:23, 135:4,
135:14, 135:24, 136:4,
136:15, 136:20,
136:23, 137:12,
137:14, 138:2
court [56] - 8:7, 8:11,
8:20, 9:2, 9:19, 9:21,
11:16, 11:19, 13:12,
14:19, 30:8, 30:9,
32:17, 36:15, 37:10,
38:9, 38:18, 65:9,
72:25, 75:23, 76:6,
76:13, 77:18, 80:4,
80:13, 80:16, 90:24,
91:7, 91:17, 92:19,

92:21, 94:7, 94:13,
94:24, 97:15, 97:22,
98:15, 98:16, 99:9,
99:11, 99:15, 99:18,
109:5, 114:18, 116:11,
121:8, 122:21, 123:20,
123:21, 127:24, 135:9,
137:5
Court [72] - 2:9, 2:10,
5:18, 6:9, 6:10, 6:12,
6:19, 7:1, 7:6, 7:8,
7:11, 7:14, 7:16, 7:25,
9:2, 9:22, 9:25, 10:3,
10:10, 12:23, 22:12,
23:10, 23:22, 26:24,
27:18, 27:19, 28:7,
28:9, 28:13, 28:23,
30:3, 30:5, 31:8, 33:8,
33:11, 38:22, 39:7,
39:24, 45:25, 46:3,
47:5, 47:8, 47:18, 49:9,
50:13, 55:18, 56:4,
58:13, 59:1, 64:8, 67:6,
67:7, 73:10, 74:22,
74:24, 75:6, 75:7, 75:9,
75:13, 75:14, 81:3,
84:25, 98:5, 106:20,
107:2, 117:12, 127:9,
132:2, 132:5, 138:12
court's [1] - 98:2
Court's [12] - 7:16,
7:20, 12:5, 12:9, 20:4,
34:9, 39:18, 67:25,
69:14, 75:16, 116:10,
131:12
Courthouse [1] - 2:10
courtroom [1] - 3:4
COURTROOM [2] -
3:1, 3:15
Courts [1] - 79:21
courts [22] - 8:3, 10:6,
10:10, 12:23, 21:20,
33:16, 49:11, 61:19,
73:14, 75:24, 76:5,
76:14, 78:4, 78:15,
78:25, 86:5, 88:14,
104:8, 114:16, 114:24,
125:1
cover [2] - 31:12,
122:18
covered [1] - 78:19
covers [2] - 117:2
CRC [1] - 2:9
create [8] - 14:16,
18:14, 18:21, 53:12,
54:9, 87:21, 121:24,
130:3
created [9] - 16:7,
67:17, 84:12, 87:15,
87:18, 89:8, 110:17,

121:2, 121:16
creates [2] - 17:21,
 54:23
creating [3] - 10:8,
 18:4, 68:5
creation [1] - 129:8
creators [1] - 23:19
credible [1] - 24:16
credit [2] - 53:2, 54:12
credits [4] - 53:2,
 53:5, 53:7, 55:3
criminal [4] - 60:23,
 60:24, 61:8, 112:23
critical [4] - 68:12,
 86:13, 124:1, 136:11
cross [1] - 108:13
CRR [2] - 2:9, 138:12
Crutcher [1] - 1:22
crypto [30] - 14:18,
 31:5, 33:13, 35:13,
 35:22, 36:7, 36:13,
 66:3, 66:17, 67:18,
 69:16, 70:4, 70:10,
 71:1, 77:7, 84:11,
 84:23, 94:4, 94:5,
 95:23, 100:3, 104:21,
 105:11, 105:14,
 105:18, 106:5, 106:22,
 124:16, 125:15, 125:16
crystal [1] - 125:1
curious [1] - 7:5
currencies [1] - 14:18
currency [4] - 14:2,
 14:4, 33:14, 36:13
customer [4] - 24:16,
 122:4, 123:13, 123:17
customers [6] - 20:23,
 25:2, 26:22, 63:15,
 63:19, 70:4
cute [1] - 11:13
CZ [1] - 96:6

D

D.C [9] - 6:13, 6:23,
 8:13, 11:1, 32:17,
 45:16, 46:7, 74:7,
 138:14
Dan [2] - 3:20, 3:22
Daniel [5] - 1:21, 2:1,
 26:23, 26:24, 130:16
DAO [10] - 34:20,
 48:13, 48:14, 48:16,
 51:9, 52:9, 52:10,
 52:13
Dated [1] - 138:8
Dave [1] - 3:13
David [1] - 1:15
DAVIS [34] - 3:22,
 44:21, 45:2, 45:22,

46:15, 47:16, 48:3,
 48:6, 48:9, 48:11,
 48:25, 49:13, 50:8,
 51:6, 51:18, 52:3, 52:5,
 52:17, 52:23, 53:13,
 53:23, 54:11, 55:21,
 56:2, 56:13, 56:19,
 57:16, 58:2, 58:21,
 60:7, 133:1, 133:6,
 133:10, 133:20
Davis [5] - 2:1, 3:22,
 13:17, 42:18, 44:20
days [1] - 50:13
DC [6] - 1:6, 1:16,
 1:23, 2:4, 2:7, 2:11
De [2] - 8:14, 8:18
DE [1] - 8:18
deal [3] - 57:3, 60:25,
 106:17
dealer [3] - 104:25,
 106:14, 121:1
dealing [7] - 40:4,
 67:22, 98:5, 125:15,
 129:6, 130:6, 137:16
deals [1] - 42:3
dealt [1] - 10:13
debate [1] - 31:5
decade [1] - 39:16
decades [2] - 80:4,
 128:23
decide [3] - 14:17,
 44:12, 47:5
decided [9] - 9:15,
 9:19, 33:8, 38:4, 48:16,
 50:4, 58:24, 120:2,
 124:19
decision [16] - 7:6,
 7:8, 7:16, 7:20, 8:10,
 23:6, 23:7, 39:18, 47:5,
 62:5, 77:23, 78:3, 85:3,
 114:24, 116:10, 121:23
decisions [6] - 8:5,
 8:11, 36:16, 76:3, 95:6,
 125:2
deeds [1] - 5:25
defeats [1] - 45:16
Defendant [2] - 1:20,
 2:1
defendant [16] - 4:3,
 9:3, 28:6, 28:14, 28:25,
 40:2, 41:12, 41:13,
 41:16, 72:23, 73:23,
 91:20, 120:1, 120:16,
 134:10, 137:4
defendant's [3] - 39:8,
 39:10, 81:17
Defendants [1] - 1:8
defendants [27] - 3:23,
 3:25, 42:14, 50:2, 50:4,
 58:18, 60:17, 65:1,

67:5, 68:9, 69:6, 69:8,
 69:9, 73:18, 79:10,
 79:17, 80:5, 81:2, 82:1,
 83:22, 85:25, 100:12,
 109:8, 116:24, 123:10,
 135:7, 136:14
defendants' [3] - 4:21,
 46:11, 55:25
defense [18] - 3:15,
 4:22, 72:21, 73:21,
 75:11, 86:7, 86:15,
 87:13, 106:20, 111:22,
 120:16, 121:2, 121:22,
 125:7, 125:15, 126:20,
 133:1, 136:7
defer [1] - 74:16
deficiencies [1] -
 79:14
define [2] - 11:17,
 17:22
defines [2] - 13:5,
 117:22
definition [6] - 15:20,
 15:21, 17:12, 52:20,
 104:14, 107:19
definitions [1] - 54:19
deliberately [1] -
 43:25
delivery [1] - 117:3
demand [5] - 14:12,
 84:14, 87:19, 87:21,
 87:24
demonstrated [1] -
 93:17
denial [1] - 30:14
dependent [3] - 83:12,
 83:15, 92:1
deploy [2] - 101:12,
 103:18
deployed [5] - 100:18,
 100:22, 101:19, 102:1,
 103:4
deployment [3] -
 84:13, 101:25, 103:22
deploys [1] - 103:15
deposit [3] - 27:3,
 132:8, 132:16
deposits [3] - 132:9,
 132:10, 132:12
depth [1] - 5:5
DEPUTY [2] - 3:1, 3:15
derivative [1] - 114:3
derivatives [5] -
 113:25, 114:1, 114:6,
 114:11, 114:14
derived [1] - 86:20
derives [1] - 93:13
described [3] -
 103:16, 110:19, 111:13
describes [3] - 26:20,

46:25, 132:15
description [2] -
 52:24, 52:25
descriptive [3] -
 80:21, 80:25, 81:5
designated [1] - 80:21
designations [1] -
 80:25
designed [4] - 12:16,
 12:17, 12:18
desirable [2] - 14:16,
 14:17
desire [1] - 14:15
despite [1] - 121:24
detailed [1] - 121:14
determinate [1] -
 68:12
determination [3] -
 86:13, 95:15, 97:24
determinative [5] -
 69:15, 87:3, 87:14,
 104:10
determine [3] - 83:19,
 109:3, 135:11
determined [3] -
 28:19, 59:10, 76:8
determines [1] -
 116:13
determining [1] -
 47:23
develop [6] - 19:25,
 79:7, 88:24, 92:6,
 101:9
developed [5] - 68:23,
 68:24, 74:25, 87:16,
 97:25
developing [6] - 18:1,
 68:6, 69:9, 90:13,
 109:12, 124:22
development [14] -
 7:18, 55:9, 68:18,
 69:22, 87:17, 88:13,
 89:3, 91:1, 95:8,
 108:17, 110:21, 111:3,
 111:6, 112:3
devoted [1] - 107:6
DeWaal [2] - 2:2, 3:24
diametrically [1] -
 79:25
dichotomy [2] - 42:3,
 87:14
Dickman [2] - 2:9,
 138:12
DICKMAN [1] - 138:4
died [1] - 28:19
difference [6] - 31:18,
 31:20, 66:11, 94:4,
 95:2, 135:14
different [24] - 6:11,
 7:1, 14:21, 16:4, 25:9,

25:20, 28:15, 36:16,
49:16, 61:7, 68:19,
77:20, 92:3, 100:20,
101:2, 101:5, 106:22,
113:3, 113:7, 113:8,
113:24, 118:15,
120:16, 131:9
differentiate [1] -
47:13
differentiates [3] -
69:2, 76:16, 94:21
differentiating [2] -
54:5, 69:5
differentiation [3] -
25:7, 25:13, 94:16
difficult [3] - 11:9,
32:19, 52:23
digital [25] - 14:2,
19:2, 31:24, 33:2, 34:2,
34:25, 45:11, 46:9,
47:4, 48:22, 49:7,
51:11, 52:1, 52:5,
52:14, 53:24, 55:2,
56:9, 56:14, 58:4, 58:6,
60:17, 66:2, 99:24,
107:12
digitized [1] - 32:5
direct [14] - 27:21,
41:2, 41:6, 72:11,
72:13, 72:17, 81:20,
97:21, 125:24, 128:15,
129:13, 129:15, 130:2,
130:3
directed [3] - 61:17,
63:9, 121:14
direction [3] - 60:18,
116:4, 126:2
directly [8] - 24:25,
42:17, 53:15, 64:18,
72:10, 83:25, 93:5,
131:6
disagree [6] - 48:21,
56:14, 77:22, 98:2,
123:8, 125:19
disagrees [1] - 132:2
disclosure [1] -
113:12
discounts [1] - 110:22
discovered [2] -
50:23, 126:3
discovery [3] - 104:16,
105:25, 106:21
discretion [6] - 36:20,
82:15, 103:13, 104:8,
124:12, 124:19
discuss [1] - 74:2
discussed [8] - 40:16,
40:17, 46:16, 50:15,
90:23, 97:9, 116:21,
133:6

discussing [1] - 35:4
discussion [4] -
36:12, 58:3, 111:16,
129:13
dismiss [15] - 20:9,
20:10, 21:8, 27:18,
27:19, 33:12, 35:10,
36:17, 36:25, 37:21,
38:13, 41:4, 116:13,
135:15, 137:8
dismissal [1] - 65:5
displacement [2] -
46:9, 132:21
dispositive [2] -
66:16, 67:6
dispute [10] - 15:20,
16:6, 16:9, 16:11,
16:12, 18:12, 18:16,
28:8, 128:11, 132:9
disputing [2] - 13:1,
29:5
disregards [1] - 87:15
disrupting [1] - 56:18
disruptive [1] - 56:20
disseminated [1] -
112:5
distinction [17] - 13:3,
13:4, 13:5, 13:7, 13:11,
31:15, 47:19, 51:8,
77:24, 91:14, 93:21,
99:19, 110:2, 128:6,
128:10, 130:2, 131:25
distinguish [2] -
88:21, 130:4
distinguishes [2] -
60:2, 95:11
distinguishing [1] -
52:9
distributed [4] - 66:15,
84:1, 103:16, 108:22
distribution [7] - 78:5,
78:7, 79:3, 91:8, 93:25,
111:12, 116:17
District [10] - 7:24,
10:1, 10:12, 21:19,
25:6, 42:9, 85:5, 86:9,
96:10, 137:1
DISTRICT [3] - 1:1,
1:1, 1:11
district [10] - 8:4,
10:13, 30:9, 75:23,
75:25, 76:5, 76:13,
122:20
divest [1] - 132:10
dividend [1] - 82:20
docket [1] - 50:23
doctrine [7] - 29:21,
30:1, 31:4, 31:11,
32:22, 33:9, 33:10
document [3] - 63:21,

63:24
documents [4] -
25:25, 26:1, 62:3, 81:1
Dodd [3] - 47:6, 58:22,
59:22
Dodd-Frank [3] - 47:6,
58:22, 59:22
DOJ [4] - 50:10, 50:14,
113:9, 113:13
dollar [5] - 24:18,
29:22, 30:25, 99:25
dollars [2] - 33:6,
123:12
domestic [6] - 39:19,
39:23, 41:24, 116:2,
116:16, 117:14
done [5] - 36:24, 64:3,
127:4, 130:5, 133:15
door [2] - 35:15, 35:17
double [1] - 51:11
double-checked [1] -
51:11
doubt [1] - 47:8
down [18] - 5:1, 8:15,
8:17, 14:8, 14:9, 14:10,
26:16, 31:14, 44:1,
57:11, 75:4, 76:18,
88:4, 94:20, 108:1,
108:2, 134:2, 136:24
downstream [1] -
91:15
dozen [1] - 44:7
draw [3] - 76:3, 77:23,
137:3
drawing [1] - 13:10
drew [1] - 40:17
drill [1] - 7:14
drilling [2] - 94:11,
94:25
drink [1] - 22:12
drive [1] - 96:25
drives [1] - 14:13
driving [3] - 33:3,
33:5, 110:12
dual [1] - 36:21
due [3] - 34:16, 71:9,
102:24
Due [1] - 37:18
Dunn [2] - 1:22, 3:17
durable [1] - 16:21
during [5] - 5:4, 73:22,
88:5, 124:9, 134:9

E

early [1] - 41:3
earmarks [2] - 52:15,
107:13
earn [5] - 26:6, 29:2,
100:10, 100:22, 102:19

Earn [3] - 27:5,
103:17, 117:10
earned [3] - 100:8,
100:25, 101:8
earning [1] - 102:25
earns [1] - 102:24
earth [1] - 55:3
eBay [1] - 18:5
economic [6] - 66:19,
85:24, 95:3, 101:7,
109:7, 110:9
economy [3] - 32:24,
33:3, 33:5
ecosystem [10] - 53:8,
53:12, 55:8, 57:1,
68:25, 87:18, 90:13,
101:2, 101:10, 112:8
Edwards [2] - 9:1,
104:8
effective [1] - 61:10
effectively [1] - 57:7
efficient [1] - 55:14
effort [1] - 86:20
efforts [53] - 6:18,
28:14, 30:11, 67:13,
68:5, 68:17, 69:8,
69:22, 69:24, 76:20,
77:5, 77:11, 79:3,
82:22, 83:13, 83:15,
83:16, 83:18, 85:19,
86:13, 90:10, 90:12,
90:13, 91:3, 91:21,
92:17, 93:2, 94:17,
95:5, 95:11, 95:18,
96:1, 96:5, 96:24,
99:24, 102:24, 103:7,
103:15, 103:22,
104:11, 106:7, 108:20,
110:11, 110:15,
111:24, 112:3, 123:19,
128:8, 128:13, 135:8,
136:6, 136:13
eight [2] - 62:14, 62:18
either [16] - 7:24,
34:18, 41:16, 50:17,
50:21, 53:12, 61:17,
63:8, 76:2, 78:6,
102:19, 104:7, 112:12,
113:12, 118:16, 131:19
elaborated [2] - 46:19,
80:20
Elastos [1] - 98:20
elected [1] - 136:8
element [10] - 19:13,
19:15, 25:3, 45:22,
46:7, 57:21, 76:19,
85:2, 95:13, 97:4
elements [2] - 19:19,
120:18
Eleventh [1] - 74:15

<p>elicit [1] - 123:17 elsewhere [1] - 73:13 embark [1] - 12:13 embodies [2] - 93:3, 94:8 emergency [1] - 32:14 Emmett [3] - 1:18, 3:11, 119:20 emphasize [2] - 42:18, 65:2 emphasized [2] - 9:5, 9:20 emphasizing [1] - 32:15 employee's [1] - 130:17 employees [14] - 41:14, 41:18, 41:25, 72:16, 73:19, 78:12, 85:8, 85:14, 85:18, 130:13, 130:15, 130:22, 130:24, 131:2 employment [1] - 85:8 enable [1] - 101:1 enact [1] - 31:6 enacted [1] - 79:13 encourage [2] - 63:10, 112:8 encouraged [1] - 17:2 encouraging [1] - 111:14 end [4] - 49:12, 51:4, 107:12, 117:13 endeavors [4] - 28:11, 101:12, 101:20, 103:6 ended [1] - 41:3 ends [1] - 47:4 enforce [1] - 126:15 enforceable [1] - 79:12 enforcement [11] - 36:20, 36:23, 37:14, 49:19, 53:1, 54:4, 56:5, 58:16, 61:20, 124:7, 124:13 engage [3] - 29:1, 43:6, 48:16 engaged [2] - 43:5, 128:22 engaging [1] - 70:18 engine [1] - 45:14 enhance [2] - 16:9, 91:21 enhanced [2] - 87:16, 94:11 enhances [2] - 84:7, 84:18 enhancing [1] - 69:9 enormous [1] - 31:3 ensuring [1] - 113:11</p>	<p>entered [2] - 50:2, 50:3 entering [1] - 128:15 Enterprise [1] - 85:5 enterprise [18] - 6:17, 16:2, 17:14, 21:2, 21:3, 22:11, 68:10, 74:2, 74:24, 75:2, 77:6, 90:19, 91:3, 92:21, 95:3, 97:13, 123:18 entertain [1] - 58:17 entire [2] - 28:4, 115:5 entirely [2] - 28:12, 117:5 entirety [2] - 32:24, 32:25 entities [6] - 49:8, 70:21, 70:22, 106:16, 118:12, 127:21 Entities [1] - 2:1 entitlement [2] - 9:3, 9:13 entity [1] - 110:18 entrepreneurial [15] - 16:8, 16:11, 16:13, 28:14, 29:1, 30:18, 54:9, 55:19, 83:17, 94:17, 99:23, 108:5, 133:13, 133:23, 135:7 entrepreneurially [1] - 28:18 environment [1] - 18:21 equal [1] - 14:15 equally [1] - 17:18 especially [3] - 41:13, 46:20, 104:18 essential [2] - 16:2, 25:3 essentially [7] - 7:20, 31:14, 42:7, 43:5, 94:17, 98:25, 120:10 establish [5] - 16:9, 45:5, 45:6, 62:10, 96:5 established [3] - 46:7, 95:21, 102:23 estate [1] - 13:4 et [16] - 1:7, 3:3, 69:7, 69:19, 79:12, 86:24, 95:4, 95:6, 96:3, 98:1, 105:10, 109:12, 109:13, 110:16, 112:7, 122:24 ether [2] - 49:4, 49:5 Ethereum [1] - 67:17 etherial [3] - 18:3, 23:13, 128:12 evaluate [6] - 74:25, 79:3, 106:3, 106:25, 108:20, 135:11</p>	<p>evaluated [5] - 67:15, 75:25, 76:6, 104:9, 108:23 evaluating [2] - 6:9, 135:10 evaluation [1] - 69:14 evasions [1] - 124:6 events [1] - 61:11 everywhere [1] - 73:18 evidence [1] - 135:11 exact [3] - 50:12, 78:5, 99:13 exactly [5] - 14:13, 15:3, 23:4, 67:23, 113:5 examination [1] - 125:22 example [19] - 52:24, 53:2, 54:12, 68:22, 69:21, 74:20, 78:6, 80:7, 85:9, 86:18, 87:2, 87:20, 88:18, 90:22, 100:14, 110:13, 110:17, 112:10 examples [1] - 86:17 exceeded [1] - 57:14 except [1] - 120:15 exception [2] - 11:23, 137:9 exceptions [1] - 41:15 exchange [28] - 16:12, 17:14, 18:4, 18:7, 18:11, 18:13, 18:14, 18:17, 19:25, 21:6, 21:9, 25:1, 25:21, 29:8, 31:15, 35:22, 60:25, 72:5, 85:19, 104:25, 106:15, 112:24, 120:25, 122:3, 129:17, 129:18, 130:6 Exchange [11] - 1:3, 1:15, 1:18, 3:2, 3:10, 5:12, 33:21, 58:22, 118:4, 118:17, 118:21 exchanges [3] - 18:9, 106:2, 112:22 excited [1] - 32:10 excluded [2] - 9:11, 22:24 exclusively [1] - 39:5 executes [1] - 83:20 exercise [2] - 37:14, 61:20 exist [1] - 7:7 existed [1] - 18:3 existence [1] - 18:10 exists [3] - 10:9, 18:7, 128:12 expansion [1] - 80:6 expansive [1] - 96:6</p>	<p>expect [3] - 17:21, 24:16, 25:3 expectation [17] - 6:16, 10:15, 24:19, 28:10, 76:20, 82:22, 88:15, 88:23, 89:8, 95:9, 95:10, 96:20, 99:21, 99:23, 103:8, 106:8, 108:16 expectations [12] - 8:3, 19:5, 31:22, 52:21, 56:25, 66:14, 81:11, 86:12, 90:7, 92:9, 93:24, 95:16 expects [1] - 36:22 experience [2] - 35:20, 95:7 expert [1] - 98:1 expertise [3] - 95:7, 103:18, 112:2 explain [5] - 5:21, 11:21, 42:25, 46:14, 47:16 explained [6] - 79:18, 81:4, 99:18, 111:5, 113:3, 118:20 explaining [1] - 6:10 explains [2] - 6:2, 83:18 explicitly [1] - 35:4 exposure [3] - 121:10, 121:15, 121:25 express [2] - 33:12, 33:15 expressed [1] - 69:20 expressly [3] - 8:8, 87:22, 110:21 extend [2] - 40:24, 61:2 extent [6] - 10:21, 27:10, 33:5, 33:18, 106:21, 124:23 external [1] - 73:9 extraterritorial [5] - 19:9, 20:3, 27:6, 39:1, 39:3 Extraterritorial [1] - 38:20 extraterritoriality [8] - 20:10, 29:10, 39:22, 43:7, 43:17, 112:18, 115:8, 115:13</p>
F			
<p>Fabulous [1] - 136:20 face [1] - 7:2 facie [1] - 63:25 facilitates [1] - 83:3 fact [38] - 8:6, 9:7,</p>			

9:21, 15:14, 18:12,
29:10, 35:23, 36:2,
39:2, 40:14, 43:8,
51:21, 53:7, 61:15,
70:4, 72:22, 77:11,
77:12, 79:19, 82:24,
83:9, 93:17, 96:21,
98:6, 98:17, 101:10,
103:15, 111:17,
120:17, 121:5, 121:9,
122:8, 124:20, 128:13,
131:2, 135:9, 137:16

fact-by-fact [1] -
124:20

factor [15] - 15:22,
31:4, 68:12, 69:5,
69:13, 69:15, 82:7,
87:3, 88:14, 88:17,
110:7, 111:20, 111:21
factors [6] - 15:10,
67:14, 67:20, 69:12,
87:11, 98:3

facts [23] - 9:24, 10:5,
10:25, 42:12, 42:24,
62:1, 63:5, 63:13, 64:7,
64:18, 67:5, 77:14,
78:8, 79:1, 80:15,
86:15, 96:16, 98:1,
100:3, 116:12, 124:3,
124:22, 137:10

**facts-and-
circumstances** [1] -
67:5

factual [1] - 120:20
fails [2] - 19:14, 27:5
failure [8] - 17:14,
40:9, 62:7, 62:9,
104:24, 104:25, 105:1,
106:15

fair [9] - 20:14, 32:3,
36:18, 36:22, 37:18,
65:15, 66:1, 71:9,
131:23

fairness [2] - 36:12,
65:21

fall [6] - 32:4, 62:13,
68:3, 72:13, 73:21,
104:13

falls [2] - 69:23,
108:25

false [2] - 70:17, 87:14

familiar [1] - 46:24

far [4] - 23:24, 42:23,
43:14, 120:7

FARER [92] - 65:14,
65:17, 66:4, 66:9,
66:17, 67:1, 67:11,
67:23, 68:16, 69:5,
69:13, 70:6, 70:9,
70:15, 70:22, 71:1,

71:8, 71:11, 71:16,
71:20, 72:11, 74:6,
74:15, 75:21, 76:4,
77:2, 77:22, 78:4,
78:25, 79:9, 81:15,
82:6, 82:16, 83:1, 83:6,
83:14, 84:9, 84:21,
85:4, 85:16, 86:4,
87:12, 88:8, 88:13,
89:22, 90:5, 90:9,
91:16, 92:14, 94:6,
94:23, 95:18, 96:14,
97:8, 97:17, 97:20,
99:4, 99:7, 99:10,
100:1, 101:5, 101:18,
101:24, 102:10,
102:16, 103:3, 103:12,
104:1, 104:5, 105:9,
106:2, 106:19, 107:15,
108:14, 109:19, 110:4,
111:19, 112:14, 113:2,
113:24, 114:5, 114:10,
115:4, 134:6, 134:9,
134:17, 134:21,
134:25, 135:5, 135:21,
136:3, 136:6

Farer [2] - 1:14, 3:11

Farer's [1] - 128:3

fashion [1] - 84:18

favor [1] - 6:18

favorable [1] - 77:16

favorably [1] - 8:13

FDA [1] - 58:25

feature [3] - 68:8,

111:6, 132:17

February [1] - 128:18

federal [6] - 38:9,

59:21, 61:19, 61:20,

107:24

feed [1] - 23:8

fell [1] - 56:23

few [2] - 29:18, 131:5

fierce [1] - 31:5

Fifth [3] - 7:8, 7:11,
7:20

figure [6] - 6:23, 12:9,
12:11, 57:10, 102:4,
124:17

file [5] - 61:11, 78:6,
99:5, 99:8, 99:12

Filecoin [2] - 110:17,
111:25

filed [4] - 35:1, 35:2,
62:1, 84:16

fill [1] - 44:14

filled [1] - 43:19

final [1] - 126:11

financing [1] - 113:10

FinCEN [4] - 50:10,

50:14, 113:8, 113:13

fine [2] - 20:5, 28:1

Firestone [1] - 137:10

Firm [1] - 3:23

first [22] - 13:25, 14:1,

14:6, 21:25, 35:8,

42:19, 45:3, 46:15,

46:20, 51:23, 55:21,

57:13, 58:21, 61:6,

70:1, 77:3, 85:2, 89:9,

104:14, 116:11, 117:7,

122:10

First [1] - 8:12

fist [1] - 120:25

fit [2] - 102:19, 103:2

fits [1] - 37:20

fitting [1] - 12:12

five [3] - 45:23, 46:20,
127:24

fixed [6] - 9:13, 9:14,
24:18, 102:21, 104:9

flexible [3] - 12:17,

102:22, 109:6

flowing [1] - 4:25

fly [1] - 126:3

focus [21] - 19:3,

75:14, 75:16, 78:10,

87:13, 87:24, 98:6,

116:7, 116:11, 116:12,

116:13, 116:16,

116:18, 116:23,

116:25, 117:8, 117:14,

118:8, 118:19

focused [11] - 36:9,

73:14, 74:24, 75:10,

88:19, 102:16, 113:8,

113:9, 113:10, 113:24

focuses [2] - 74:16,

101:24

focusing [4] - 90:16,

97:24, 100:5, 102:2

folks [1] - 88:19

follow [1] - 51:18

following [1] - 117:21

footnote [1] - 58:13

footprint [1] - 96:6

FOR [1] - 1:1

force [1] - 54:22

forceful [1] - 5:16

forcefully [1] - 44:24

forces [4] - 15:22,

69:6, 87:10, 87:12

foregoing [1] - 138:5

foreign [8] - 39:5,

39:21, 41:12, 41:13,

41:22, 42:4, 42:13,

63:17

Foreman [1] - 108:23

forever [2] - 89:13,

128:20

forget [1] - 20:11

form [1] - 86:21

former [1] - 114:15

formulating [1] -

56:16

formulation [1] - 6:15

forth [1] - 6:4

fortunes [5] - 14:10,

19:5, 19:6, 75:2,

110:23

forward [1] - 96:17

Foundation [1] - 98:20

founder [1] - 120:23

founders [1] - 110:23

four [1] - 45:23

fraction [1] - 46:1

fractional [1] - 46:5

frame [1] - 79:19

framed [2] - 100:13

framework [5] - 34:25,

37:6, 62:12, 63:13,

113:7

Frank [3] - 47:6,

58:22, 59:22

frankly [3] - 50:9,

52:11, 96:4

fraud [7] - 47:7, 49:25,

56:6, 70:9, 70:18,

119:3, 119:16

frequency [1] - 4:15

friend [1] - 128:22

front [2] - 32:9, 84:19

fruition [1] - 111:4

frustrated [1] - 109:5

FTC [1] - 126:2

full [4] - 59:5, 66:13,

113:11, 138:6

fully [1] - 43:1

function [1] - 65:9

functions [1] - 80:9

Fund [10] - 6:14, 6:22,

12:2, 40:5, 40:8, 45:23,

74:8, 115:22, 116:20

fund [2] - 12:7, 110:21

fundamental [1] - 33:1

fundraising [1] -

110:20

funds [10] - 18:14,

26:18, 75:9, 101:8,

103:15, 103:16,

103:22, 111:25, 132:14

fungible [1] - 54:7

future [6] - 10:15,

49:5, 54:10, 110:24,

114:3, 114:13

Future [1] - 48:23

future-based [1] -

49:5

futures [4] - 113:24,

114:1, 114:6, 114:11

<p style="text-align: center;">G</p> <p>game [1] - 60:21</p> <p>gap [1] - 44:14</p> <p>gaps [3] - 124:23, 124:25, 125:24</p> <p>Gary [8] - 2:2, 3:24, 59:18, 59:19, 60:3, 86:9, 86:21, 86:25</p> <p>gas [2] - 54:1, 55:2</p> <p>gee [1] - 50:19</p> <p>General [1] - 46:23</p> <p>general [6] - 46:24, 80:23, 80:24, 88:2, 114:15, 135:24</p> <p>generally [4] - 22:24, 58:4, 74:10, 107:9</p> <p>generate [6] - 10:17, 12:7, 16:21, 19:22, 104:17, 132:12</p> <p>generated [2] - 30:18, 84:12</p> <p>generating [1] - 100:18</p> <p>generous [1] - 127:6</p> <p>Gensler [1] - 37:6</p> <p>Genzer [1] - 125:8</p> <p>German [1] - 34:21</p> <p>get-go [1] - 103:11</p> <p>Gibson [2] - 1:22, 3:17</p> <p>given [11] - 4:10, 35:22, 46:25, 57:18, 64:10, 80:8, 96:5, 109:15, 125:6, 125:12, 132:6</p> <p>Glen [1] - 86:9</p> <p>Glen-Arden [1] - 86:9</p> <p>glibly [1] - 107:20</p> <p>global [1] - 96:5</p> <p>glory [1] - 136:18</p> <p>going-in [2] - 89:7, 89:8</p> <p>gold [4] - 54:1, 54:7, 69:4, 69:7</p> <p>governed [1] - 114:14</p> <p>governing [1] - 31:7</p> <p>government [4] - 15:15, 19:1, 46:12, 107:24</p> <p>government's [1] - 38:25</p> <p>grab [2] - 22:12, 27:25</p> <p>grappled [1] - 72:25</p> <p>grappling [1] - 90:24</p> <p>grateful [1] - 132:22</p> <p>great [1] - 54:22</p> <p>greatest [1] - 18:25</p> <p>Gregory [5] - 1:22, 3:19, 19:10, 27:6, 34:13</p>	<p>GREGORY [25] - 34:14, 35:7, 35:20, 36:18, 37:4, 37:17, 38:1, 38:12, 38:18, 38:21, 39:6, 40:11, 41:1, 41:11, 42:6, 42:19, 43:11, 43:23, 44:3, 44:16, 134:14, 136:19, 136:21, 136:25, 137:13</p> <p>Gregory's [1] - 29:19</p> <p>grounds [1] - 41:5</p> <p>grove [2] - 48:8, 48:11</p> <p>groves [1] - 31:18</p> <p>guaranteed [1] - 104:6</p> <p>guess [11] - 13:25, 50:25, 53:23, 67:9, 89:19, 95:15, 105:7, 115:8, 115:21, 122:14, 125:13</p> <p>guidance [4] - 36:2, 71:12, 123:16</p> <p>guilty [1] - 61:9</p> <p>guys [1] - 8:6</p> <p style="text-align: center;">H</p> <p>Hague [1] - 73:12</p> <p>halfheartedly [1] - 124:8</p> <p>hand [1] - 35:15</p> <p>handle [2] - 71:8, 115:14</p> <p>handled [1] - 9:2</p> <p>handling [6] - 3:12, 63:21, 65:19, 65:20, 75:9, 115:12</p> <p>hands [4] - 45:8, 45:15, 57:21, 128:24</p> <p>happenstance [1] - 89:4</p> <p>happy [2] - 27:24, 126:22</p> <p>hard [6] - 14:13, 15:3, 24:4, 121:12, 124:2</p> <p>hard-pressed [1] - 24:4</p> <p>harder [6] - 33:24, 54:11, 60:20, 60:23, 61:4, 121:13</p> <p>hardly [1] - 33:3</p> <p>headline [1] - 63:3</p> <p>hear [10] - 15:13, 60:10, 60:12, 65:10, 65:12, 127:13, 127:17, 127:18, 127:21, 136:1</p> <p>heard [3] - 29:16, 93:20, 130:11</p> <p>HEARING [2] - 1:5, 1:9</p> <p>hearing [6] - 4:16,</p>	<p>50:5, 50:22, 55:17, 104:19, 107:21</p> <p>heart [1] - 95:24</p> <p>heavily [1] - 136:14</p> <p>held [3] - 33:16, 45:15, 46:10</p> <p>HELD [1] - 1:10</p> <p>help [1] - 53:5</p> <p>helpful [3] - 80:14, 86:4, 110:14</p> <p>helping [1] - 129:10</p> <p>helps [1] - 47:5</p> <p>hereby [1] - 138:4</p> <p>high [3] - 100:10, 128:14, 130:24</p> <p>high-performing [1] - 130:24</p> <p>highlight [4] - 65:18, 71:21, 79:23, 113:6</p> <p>highlighted [3] - 76:13, 76:14, 95:2</p> <p>highlights [1] - 82:20</p> <p>himself [1] - 121:17</p> <p>hired [2] - 121:9, 124:4</p> <p>history [2] - 5:14, 73:4</p> <p>hold [2] - 23:22, 31:13</p> <p>holder [1] - 81:19</p> <p>Holding [1] - 3:3</p> <p>holding [7] - 10:21, 11:1, 35:15, 35:17, 38:17, 78:2, 118:5</p> <p>Holdings [2] - 1:6, 3:17</p> <p>holdings [1] - 93:8</p> <p>hole [1] - 117:3</p> <p>holistic [1] - 59:15</p> <p>home [1] - 127:16</p> <p>Honor [205] - 3:1, 3:8, 3:16, 3:22, 4:2, 5:8, 5:23, 6:22, 8:25, 10:20, 12:4, 15:12, 15:18, 15:24, 17:19, 19:8, 19:20, 20:17, 21:7, 22:15, 23:4, 25:17, 26:8, 27:14, 28:3, 28:4, 28:20, 32:4, 34:4, 34:8, 34:14, 35:7, 35:9, 35:21, 36:6, 37:18, 37:19, 38:3, 40:11, 42:6, 42:19, 43:12, 43:17, 44:3, 44:16, 44:21, 45:2, 46:15, 47:3, 47:17, 48:3, 48:6, 49:4, 49:13, 50:9, 51:19, 52:3, 52:17, 52:24, 53:14, 55:6, 55:21, 57:16, 58:3, 58:21, 60:7, 60:21, 61:6, 61:25, 65:4,</p>	<p>65:14, 65:18, 66:4, 66:9, 66:17, 66:18, 67:2, 67:7, 67:11, 67:24, 68:22, 69:13, 70:6, 70:9, 70:15, 70:22, 71:2, 71:9, 71:11, 71:12, 71:16, 71:20, 72:11, 72:25, 73:4, 73:17, 74:6, 74:15, 74:22, 75:21, 76:4, 77:2, 77:9, 77:13, 77:23, 78:4, 78:25, 79:9, 79:13, 79:23, 81:15, 81:22, 82:6, 84:9, 84:21, 85:4, 85:17, 86:4, 88:8, 88:19, 89:22, 90:5, 90:22, 91:16, 92:14, 92:17, 94:6, 94:23, 95:19, 96:4, 96:21, 97:3, 97:8, 97:14, 97:18, 98:6, 98:12, 99:4, 99:7, 99:13, 100:2, 100:14, 100:20, 101:11, 102:10, 102:16, 104:2, 104:5, 105:9, 106:2, 106:19, 107:15, 108:15, 108:18, 109:19, 110:4, 111:5, 111:19, 111:22, 112:14, 113:2, 113:14, 113:19, 113:25, 114:5, 114:12, 115:4, 115:12, 115:19, 116:1, 116:16, 116:20, 117:1, 117:8, 117:18, 118:2, 118:25, 119:14, 119:20, 120:15, 123:3, 125:3, 126:4, 126:10, 126:19, 127:8, 128:1, 131:23, 132:18, 132:22, 133:6, 133:10, 133:25, 134:6, 134:14, 134:17, 134:21, 134:25, 135:3, 135:8, 135:12, 135:21, 136:3, 136:19, 137:13</p> <p>Honor's [4] - 27:4, 69:17, 78:10, 96:17</p> <p>HONORABLE [1] - 1:10</p> <p>hooks [1] - 39:23</p> <p>horizontal [10] - 45:5, 45:17, 45:20, 74:4, 74:10, 74:11, 74:21, 76:2, 76:7, 76:11</p> <p>Houghton [1] - 85:4</p> <p>Howey [46] - 5:19, 5:22, 5:23, 6:1, 6:2, 8:4, 8:25, 9:16, 10:18, 13:21, 15:10, 15:21,</p>
--	--	--	---

<p>19:13, 19:18, 20:2, 25:4, 26:22, 28:9, 44:25, 45:1, 45:16, 51:8, 52:22, 58:24, 65:19, 67:20, 69:12, 74:1, 77:23, 78:18, 85:1, 87:7, 87:8, 95:13, 96:15, 97:4, 98:4, 107:19, 109:5, 114:24, 123:23, 124:25, 125:3, 125:16, 126:14</p> <p>hundreds [2] - 107:1, 107:6</p> <p>Huvelle [1] - 64:11</p> <p>hype [1] - 17:17</p> <p>hypothetical [3] - 24:4, 53:19, 109:8</p>	<p>110:8, 110:9, 111:6, 111:21, 113:6, 131:12</p> <p>importantly [1] - 44:9</p> <p>impose [1] - 37:13</p> <p>imposes [1] - 98:3</p> <p>improve [1] - 57:1</p> <p>IN [1] - 1:1</p> <p>in-depth [1] - 5:5</p> <p>inaction [1] - 36:13</p> <p>incentive [1] - 85:9</p> <p>inception [2] - 96:17, 108:15</p> <p>inclined [1] - 29:23</p> <p>include [6] - 41:15, 52:6, 95:4, 103:19, 103:20</p> <p>included [3] - 48:17, 73:9, 111:12</p> <p>includes [2] - 48:12, 71:13</p> <p>including [9] - 4:8, 8:11, 67:12, 77:4, 80:16, 90:14, 110:21, 111:25, 116:21</p> <p>inconsistency [1] - 112:25</p> <p>inconsistent [1] - 37:9</p> <p>incorporation [1] - 108:23</p> <p>incorrect [1] - 39:6</p> <p>increase [6] - 55:19, 68:20, 83:11, 84:14, 112:1, 112:9</p> <p>increased [2] - 15:21, 87:19</p> <p>increases [1] - 78:17</p> <p>indeed [3] - 18:13, 56:19, 79:13</p> <p>independent [1] - 33:11</p> <p>independently [1] - 131:11</p> <p>indicative [1] - 45:20</p> <p>indicia [1] - 53:24</p> <p>individual [3] - 46:1, 120:1, 122:20</p> <p>individuals [1] - 42:11</p> <p>induce [1] - 112:4</p> <p>inducement [1] - 108:21</p> <p>inducements [1] - 95:3</p> <p>indulge [1] - 30:3</p> <p>indulgence [1] - 34:9</p> <p>industry [14] - 12:14, 29:23, 30:25, 31:7, 32:23, 32:25, 34:23, 35:14, 35:23, 36:13, 37:7, 107:22, 124:16, 124:22</p>	<p>inextricably [4] - 68:1, 68:11, 69:1, 110:6</p> <p>inferences [1] - 77:14</p> <p>information [2] - 63:20, 86:22</p> <p>infrastructure [1] - 136:10</p> <p>inherent [7] - 8:9, 14:1, 36:5, 53:3, 93:12, 109:15, 109:17</p> <p>initial [23] - 4:15, 21:13, 40:22, 44:23, 50:22, 55:12, 71:18, 75:19, 91:7, 92:24, 97:11, 99:16, 101:16, 102:6, 110:20, 110:23, 112:8, 113:16, 114:21, 115:1, 115:2</p> <p>injunctive [4] - 42:22, 42:24, 43:3, 134:18</p> <p>instance [3] - 76:11, 83:22, 106:5</p> <p>instances [1] - 83:6</p> <p>instead [2] - 36:20, 132:13</p> <p>institutional [2] - 25:10, 77:19</p> <p>instructed [1] - 64:8</p> <p>instrument [4] - 80:23, 86:11, 92:23, 94:25</p> <p>instruments [2] - 81:10, 81:12</p> <p>insulate [1] - 121:17</p> <p>insured [1] - 28:12</p> <p>integral [1] - 69:8</p> <p>intellectual [1] - 95:6</p> <p>intended [1] - 12:25</p> <p>intense [1] - 135:9</p> <p>intentional [3] - 89:4, 96:1, 96:5</p> <p>intentionally [2] - 95:21, 109:6</p> <p>Interactive [1] - 10:12</p> <p>interdependence [1] - 75:1</p> <p>interdependency [4] - 75:4, 75:10, 75:14, 97:10</p> <p>interdependent [4] - 68:4, 68:11, 68:14, 68:16</p> <p>interest [12] - 28:6, 38:4, 46:5, 80:23, 101:8, 102:20, 102:22, 102:25, 103:2, 103:24, 104:1, 129:11</p> <p>interested [1] - 29:20</p> <p>interesting [1] - 79:24</p> <p>interestingly [2] - 80:3, 86:6</p>	<p>interests [1] - 113:12</p> <p>intermediary [1] - 118:21</p> <p>internet [1] - 115:18</p> <p>interpretation [2] - 37:10, 38:24</p> <p>interrupts [1] - 49:2</p> <p>intertwined [4] - 68:2, 68:11, 69:1, 110:6</p> <p>intervene [1] - 58:19</p> <p>interwoven [2] - 92:22, 94:25</p> <p>introduce [1] - 3:6</p> <p>introduction [1] - 103:17</p> <p>intrudes [1] - 126:8</p> <p>intruding [1] - 127:18</p> <p>invest [3] - 14:18, 16:15, 16:22</p> <p>invested [1] - 85:2</p> <p>investigation [1] - 62:2</p> <p>investigations [1] - 125:17</p> <p>investing [6] - 12:6, 12:17, 17:6, 74:1, 108:10</p> <p>investment [144] - 5:11, 5:14, 5:19, 6:3, 6:12, 6:15, 6:24, 7:2, 7:7, 7:9, 8:21, 8:22, 9:4, 9:6, 9:11, 9:23, 10:3, 10:14, 10:21, 10:23, 11:3, 11:10, 11:14, 11:22, 12:7, 12:13, 12:24, 15:20, 16:1, 19:22, 19:23, 20:15, 20:25, 21:1, 21:2, 21:21, 21:24, 22:2, 22:10, 22:24, 23:7, 23:20, 23:23, 24:5, 24:14, 25:8, 26:6, 26:14, 26:15, 26:21, 27:12, 28:7, 29:1, 29:2, 29:3, 30:11, 31:9, 31:14, 31:21, 33:17, 33:22, 33:23, 33:25, 48:1, 48:17, 48:20, 48:22, 49:1, 51:3, 51:22, 52:18, 53:9, 53:21, 54:18, 56:12, 56:15, 56:19, 57:8, 58:7, 66:11, 67:2, 68:23, 70:11, 72:1, 72:5, 79:4, 80:22, 81:4, 81:14, 82:11, 83:8, 84:12, 84:24, 85:6, 85:20, 86:25, 87:4, 89:10, 89:12, 89:24, 90:11, 90:20, 91:22,</p>
<p>I</p>			
<p>iceberg [1] - 107:8</p> <p>ICO [27] - 19:7, 19:8, 19:14, 20:2, 20:10, 29:12, 35:9, 49:14, 55:22, 71:18, 71:23, 71:25, 72:4, 72:18, 72:20, 74:3, 81:19, 90:21, 92:5, 92:24, 93:6, 116:5, 123:14, 129:15, 134:4, 134:7</p> <p>ICOs [1] - 123:11</p> <p>idea [1] - 121:19</p> <p>identified [4] - 4:23, 67:18, 113:16, 117:8</p> <p>identifies [1] - 116:12</p> <p>identify [1] - 116:11</p> <p>ignore [2] - 68:9, 69:8</p> <p>ignores [1] - 87:25</p> <p>Ill [1] - 2:6</p> <p>ill [1] - 12:12</p> <p>ill-fitting [1] - 12:12</p> <p>illegal [1] - 128:22</p> <p>Illinois [1] - 50:23</p> <p>imagine [2] - 23:25, 121:12</p> <p>impact [3] - 77:6, 83:19, 96:19</p> <p>impacted [1] - 135:12</p> <p>impacts [4] - 83:25, 87:20, 136:8, 136:9</p> <p>impersonal [1] - 129:19</p> <p>implemented [2] - 82:17, 82:21</p> <p>implicate [1] - 33:8</p> <p>implications [2] - 32:20, 106:24</p> <p>important [13] - 36:16, 55:9, 67:25, 69:15, 88:17, 88:25, 97:6,</p>			

<p>92:4, 92:6, 92:11, 92:15, 92:16, 92:18, 92:22, 93:4, 93:20, 93:23, 94:8, 94:22, 96:8, 96:23, 97:12, 98:9, 98:15, 101:3, 101:15, 101:16, 101:20, 101:22, 102:7, 102:24, 104:7, 104:14, 106:9, 107:5, 107:11, 109:4, 110:10, 112:3, 114:13, 114:22, 130:10, 130:15, 130:17, 133:14, 135:6</p> <p>investments [3] - 16:17, 33:2, 35:25</p> <p>Investor [1] - 82:10</p> <p>investor [10] - 16:16, 19:23, 26:25, 30:19, 77:19, 77:25, 94:13, 102:21, 102:25, 123:15</p> <p>investor's [1] - 29:2</p> <p>investors [46] - 6:16, 12:6, 18:15, 25:11, 39:14, 62:11, 63:1, 63:4, 63:10, 68:4, 69:23, 70:10, 70:17, 70:20, 72:5, 72:7, 75:1, 75:20, 77:8, 77:24, 79:16, 84:1, 84:14, 89:1, 91:13, 91:23, 92:25, 93:10, 97:1, 98:22, 98:24, 100:24, 103:4, 106:10, 110:7, 110:23, 111:7, 112:4, 112:8, 112:9, 113:11, 117:11, 121:20, 132:13</p> <p>involve [2] - 5:15, 69:7</p> <p>involved [10] - 5:24, 5:25, 9:1, 10:23, 12:5, 55:22, 87:12, 90:18, 129:5</p> <p>involves [1] - 42:10</p> <p>involving [6] - 48:22, 94:12, 98:20, 105:11, 118:11, 134:4</p> <p>IPO [2] - 92:2, 123:14</p> <p>iron [1] - 120:24</p> <p>Islands [2] - 44:4, 91:2</p> <p>issuance [1] - 105:20</p> <p>issue [68] - 9:16, 13:16, 24:12, 31:3, 32:14, 38:14, 38:24, 55:23, 57:18, 60:4, 60:7, 65:24, 67:25, 69:10, 70:11, 71:14, 73:1, 73:3, 73:25, 74:23, 75:1, 78:9, 79:4, 80:2, 80:15, 81:16, 81:25, 82:10, 83:15,</p>	<p>85:10, 86:6, 86:11, 87:15, 88:22, 89:25, 92:23, 93:14, 94:11, 94:25, 96:25, 97:20, 98:16, 99:13, 99:14, 100:1, 100:4, 100:16, 101:11, 104:13, 105:11, 105:16, 106:22, 106:23, 106:24, 109:7, 109:9, 111:8, 113:5, 113:12, 114:6, 114:16, 115:5, 116:8, 118:25, 119:2, 126:1, 134:5</p> <p>issued [10] - 14:2, 14:3, 14:6, 17:25, 21:15, 34:25, 53:6, 71:11, 108:7, 114:13</p> <p>issuer [7] - 10:16, 19:6, 45:9, 53:15, 78:17, 89:9, 111:18</p> <p>issuers [18] - 57:21, 67:13, 68:14, 69:18, 75:2, 76:23, 77:3, 88:21, 93:2, 93:9, 95:4, 104:18, 105:7, 108:13, 109:11, 110:7, 110:10</p> <p>issues [11] - 4:23, 27:9, 29:19, 42:16, 55:24, 55:25, 56:2, 64:25, 65:19, 106:14, 107:3</p> <p>issuing [1] - 122:21</p> <p>italics [2] - 9:6, 9:8</p> <p>item [2] - 93:22, 93:25</p> <p>itself [28] - 14:23, 40:16, 41:6, 48:1, 48:17, 52:6, 53:3, 56:12, 58:4, 66:24, 83:2, 83:19, 84:4, 92:14, 93:13, 94:8, 97:1, 97:11, 100:2, 103:12, 109:15, 113:18, 122:21, 125:20, 131:15, 133:16, 133:24, 137:11</p>	<p>join [1] - 65:4</p> <p>Joiner [11] - 7:5, 7:19, 7:21, 8:10, 80:1, 80:9, 80:13, 86:9, 92:21, 94:10, 94:24</p> <p>Jorge [2] - 1:17, 3:9</p> <p>judge [2] - 122:19</p> <p>JUDGE [2] - 1:10, 1:11</p> <p>Judge [13] - 46:25, 57:24, 58:2, 58:10, 58:20, 64:11, 87:6, 99:18, 100:15, 102:2, 102:3, 114:24, 137:1</p> <p>judge-by-judge [1] - 122:19</p> <p>judges [1] - 57:10</p> <p>judgment [2] - 87:7, 135:15</p> <p>July [5] - 34:21, 35:8, 35:11, 41:3, 41:7</p> <p>jump [1] - 111:23</p> <p>June [2] - 39:8, 61:11</p> <p>jurisdiction [55] - 38:10, 38:11, 38:13, 38:16, 38:19, 46:9, 47:1, 47:3, 49:3, 49:19, 53:1, 54:15, 54:16, 56:6, 56:18, 56:20, 56:21, 56:23, 57:14, 58:1, 58:7, 58:11, 59:23, 60:2, 60:5, 60:8, 60:19, 61:13, 61:15, 61:20, 62:10, 64:1, 65:6, 65:21, 73:16, 112:18, 113:4, 114:4, 114:18, 115:8, 115:16, 115:20, 118:24, 119:25, 120:6, 120:19, 120:21, 121:6, 121:10, 122:7, 126:9, 127:17</p> <p>jurisdictional [3] - 38:23, 49:8, 61:25</p> <p>jurisdictions [2] - 44:6, 59:2</p> <p>Justice [1] - 9:4</p>	<p>known [1] - 80:23</p> <p>knows [2] - 25:19, 130:6</p> <p>KYC [1] - 63:20</p>
			L
			<p>Labs [7] - 22:25, 35:1, 47:12, 77:18, 84:25, 93:22, 110:18</p> <p>lack [5] - 37:18, 38:13, 54:17, 65:6, 80:6</p> <p>lacks [1] - 38:18</p> <p>laid [1] - 78:7</p> <p>land [2] - 5:25, 7:10</p> <p>language [15] - 9:20, 9:21, 12:2, 12:10, 27:22, 40:14, 43:5, 73:5, 73:6, 73:9, 73:10, 87:8, 131:20</p> <p>large [4] - 63:16, 107:25, 112:11, 124:14</p> <p>larger [2] - 112:16, 115:9</p> <p>largest [1] - 95:22</p> <p>last [10] - 29:17, 30:3, 32:4, 32:8, 39:8, 50:1, 57:17, 128:17, 128:20, 136:16</p> <p>late [1] - 43:14</p> <p>Latham [3] - 2:6, 4:3, 4:4</p> <p>latter [1] - 66:16</p> <p>launch [2] - 22:18, 111:24</p> <p>launched [1] - 111:1</p> <p>laundering [1] - 113:9</p> <p>Law [1] - 3:23</p> <p>law [19] - 5:10, 7:4, 12:15, 19:2, 32:11, 40:10, 44:11, 61:20, 72:21, 79:15, 79:22, 89:14, 105:18, 116:3, 120:2, 124:23, 124:25, 125:24</p> <p>laws [23] - 5:12, 8:24, 12:25, 31:6, 34:24, 39:1, 41:23, 54:20, 58:24, 79:13, 79:20, 79:22, 104:20, 106:4, 113:10, 114:19, 121:11, 121:16, 121:25, 123:19, 123:21, 123:25, 130:16</p> <p>lawsuit [2] - 58:19, 104:18</p> <p>lawyer [1] - 13:15</p> <p>lawyers [4] - 50:3, 55:17, 57:13, 64:25</p> <p>lease [1] - 7:17</p>
	J	K	
<p>JACKSON [1] - 1:10</p> <p>Janice [2] - 2:9, 138:12</p> <p>JANICE [1] - 138:4</p> <p>January [2] - 1:6, 138:8</p> <p>Jason [3] - 1:21, 3:16, 128:1</p> <p>Jennifer [2] - 1:14, 3:11</p> <p>John [2] - 1:18, 78:3</p>		<p>Katten [2] - 2:2, 3:23</p> <p>keenly [1] - 121:15</p> <p>keep [4] - 8:6, 26:16, 31:17, 125:9</p> <p>keeps [1] - 13:4</p> <p>key [1] - 60:7</p> <p>Kik [4] - 10:11, 10:22, 35:1, 123:21</p> <p>kind [5] - 24:8, 25:6, 105:25, 121:21, 122:10</p> <p>kinds [1] - 81:1</p> <p>knowledge [1] - 98:3</p>	

<p>leaseholds ^[1] - 94:11</p> <p>leases ^[1] - 7:9</p> <p>least ^[1] - 101:1</p> <p>leave ^[2] - 69:4, 119:9</p> <p>lectern ^[2] - 3:7, 4:11</p> <p>ledger ^[1] - 54:25</p> <p>left ^[3] - 38:8, 53:4, 75:4</p> <p>legal ^[2] - 15:8, 38:7</p> <p>legally ^[1] - 79:12</p> <p>legislation ^[5] - 37:23, 37:25, 38:2, 38:5, 122:16</p> <p>legislative ^[1] - 115:10</p> <p>legislators ^[1] - 73:7</p> <p>legitimate ^[2] - 36:11, 56:3</p> <p>lend ^[1] - 102:21</p> <p>less ^[2] - 54:13, 55:6</p> <p>letter ^[5] - 46:22, 46:25, 114:16, 125:25, 126:11</p> <p>liability ^[3] - 39:10, 62:8, 98:11</p> <p>licensed ^[2] - 44:6, 44:7</p> <p>Life ^[25] - 8:13, 11:1, 11:6, 11:8, 12:1, 19:20, 21:3, 27:22, 30:6, 45:4, 45:19, 45:24, 46:7, 57:22, 68:12, 75:7, 75:23, 76:7, 76:11, 83:18, 128:5, 129:9, 133:12, 135:9, 136:14</p> <p>light ^[2] - 77:15, 98:6</p> <p>likely ^[1] - 4:10</p> <p>limit ^[1] - 72:3</p> <p>limitations ^[20] - 19:10, 37:12, 40:21, 40:24, 41:5, 41:9, 41:12, 41:15, 41:24, 42:14, 42:21, 72:22, 129:25, 134:2, 134:5, 134:10, 134:19, 136:22, 137:4, 137:9</p> <p>Limited ^[6] - 1:6, 3:3, 3:17, 86:9, 86:17, 87:2</p> <p>limited ^[3] - 71:23, 111:11, 118:5</p> <p>limiting ^[8] - 13:3, 46:17, 49:1, 54:22, 59:6, 80:6, 90:24, 108:19</p> <p>limitless ^[1] - 109:8</p> <p>line ^[8] - 21:23, 32:6, 47:5, 60:9, 66:19, 108:13, 109:5, 128:5</p> <p>lines ^[1] - 4:22</p> <p>link ^[1] - 137:2</p> <p>linking ^[1] - 96:9</p>	<p>liquidity ^[2] - 88:25, 111:8</p> <p>Lisa ^[2] - 1:14, 3:13</p> <p>list ^[2] - 86:10, 121:23</p> <p>litigation ^[4] - 13:7, 36:12, 119:12, 122:19</p> <p>live ^[1] - 18:2</p> <p>lives ^[1] - 117:24</p> <p>LLP ^[3] - 1:22, 2:2, 2:6</p> <p>loans ^[2] - 26:20, 103:20</p> <p>location ^[1] - 73:15</p> <p>locations ^[2] - 44:8, 63:11</p> <p>lock ^[2] - 10:4, 10:23</p> <p>lock-up ^[2] - 10:4, 10:23</p> <p>Logan ^[1] - 123:21</p> <p>logical ^[1] - 5:16</p> <p>logically ^[1] - 4:25</p> <p>Look ^[1] - 37:23</p> <p>look ^[26] - 32:20, 35:20, 45:10, 48:13, 51:10, 59:4, 62:9, 62:17, 63:12, 79:1, 80:3, 83:16, 85:24, 88:17, 89:15, 105:25, 108:21, 108:22, 109:2, 109:6, 110:16, 125:20, 125:21, 126:2, 131:14, 131:19</p> <p>looked ^[7] - 42:7, 50:23, 76:10, 76:14, 80:16, 88:14, 105:19</p> <p>looking ^[9] - 8:20, 10:6, 28:25, 66:19, 68:12, 108:24, 118:6, 128:6, 134:4</p> <p>looks ^[6] - 75:8, 75:15, 84:10, 116:12, 123:13, 123:14</p> <p>loosely ^[1] - 36:9</p> <p>loss ^[2] - 17:24, 130:20</p> <p>loving ^[1] - 53:12</p> <p>LPI ^[1] - 28:14</p> <p>Luz ^[2] - 8:14, 8:18</p> <p>LUZ ^[1] - 8:18</p> <p>Lynch ^[1] - 59:18</p>	<p>maintenance ^[2] - 68:18, 136:10</p> <p>major ^[13] - 29:21, 30:1, 30:24, 31:4, 31:11, 32:22, 33:8, 34:2, 34:15, 38:3, 65:20, 124:24</p> <p>majority ^[1] - 9:5</p> <p>manage ^[2] - 83:24</p> <p>managed ^[1] - 16:7</p> <p>management ^[2] - 18:18, 92:2</p> <p>Management ^[2] - 70:13, 119:5</p> <p>manager ^[2] - 62:20, 62:22</p> <p>managerial ^[11] - 16:8, 28:14, 28:18, 29:1, 30:17, 54:8, 55:18, 83:17, 94:17, 99:23, 135:7</p> <p>managerially ^[1] - 88:5</p> <p>mandate ^[1] - 12:15</p> <p>mandated ^[1] - 98:4</p> <p>manipulation ^[1] - 47:7</p> <p>manner ^[4] - 47:13, 110:2, 115:9, 115:10</p> <p>market ^[29] - 15:22, 22:22, 24:20, 24:23, 25:21, 31:5, 33:14, 45:7, 45:8, 51:6, 51:23, 69:6, 69:10, 69:20, 86:24, 87:10, 87:12, 87:15, 87:24, 88:13, 88:25, 89:4, 93:18, 95:9, 98:17, 111:4, 111:6, 112:4, 129:9</p> <p>marketed ^[15] - 19:4, 25:14, 47:14, 52:20, 56:24, 67:10, 67:21, 77:21, 78:12, 78:23, 84:4, 87:18, 102:20, 115:17, 126:7</p> <p>marketing ^[20] - 34:22, 39:14, 72:5, 78:21, 79:3, 81:12, 82:4, 85:22, 86:19, 86:20, 86:21, 88:24, 89:17, 90:11, 90:12, 90:20, 92:25, 95:5, 96:1</p> <p>markets ^[6] - 47:21, 52:25, 83:20, 89:2, 113:11, 124:14</p> <p>mass ^[1] - 124:1</p> <p>Massachusetts ^[1] - 42:9</p> <p>matches ^[1] - 45:14</p> <p>matching ^[1] - 45:13</p>	<p>material ^[1] - 118:11</p> <p>materially ^[1] - 70:17</p> <p>materials ^[3] - 81:12, 82:4, 84:15</p> <p>Matt ^[1] - 3:19</p> <p>matter ^[22] - 22:17, 36:14, 37:16, 38:5, 38:9, 38:15, 38:19, 51:1, 51:20, 70:23, 73:16, 77:21, 79:8, 109:20, 109:21, 115:16, 115:20, 117:24, 122:15, 137:5, 137:7, 137:17</p> <p>matters ^[4] - 9:7, 61:22, 137:6, 137:18</p> <p>Matthew ^[3] - 1:13, 1:22, 3:11</p> <p>McConnell ^[1] - 58:2</p> <p>McDonnell ^[2] - 57:25, 113:2</p> <p>mean ^[19] - 15:14, 26:3, 31:12, 32:4, 37:7, 37:15, 44:7, 47:11, 55:15, 78:2, 79:6, 88:11, 88:20, 91:11, 103:23, 108:23, 109:4, 128:22, 131:19</p> <p>meaning ^[2] - 80:19, 130:15</p> <p>meaningful ^[4] - 13:11, 28:13, 47:19, 121:7</p> <p>meaningfully ^[1] - 133:14</p> <p>meanings ^[1] - 120:16</p> <p>means ^[4] - 6:12, 9:4, 11:14, 111:18</p> <p>meant ^[4] - 8:2, 25:23, 25:24, 58:2</p> <p>measures ^[1] - 67:3</p> <p>mechanism ^[3] - 12:13, 83:2, 87:20</p> <p>mechanisms ^[1] - 87:19</p> <p>media ^[3] - 63:4, 82:5, 112:6</p> <p>meet ^[5] - 15:20, 46:6, 92:3, 92:11, 101:3</p> <p>meeting ^[3] - 10:8, 18:4, 129:2</p> <p>member ^[1] - 77:20</p> <p>MENDRO ^[74] - 3:16, 5:8, 5:23, 6:6, 6:8, 6:21, 8:9, 8:17, 9:18, 10:20, 11:8, 11:20, 12:4, 12:22, 13:17, 14:3, 14:7, 14:9, 14:12, 14:24, 15:1, 15:12, 15:18, 15:24, 16:10,</p>
M			
<p>maintain ^[8] - 72:19, 93:10, 94:8, 97:8, 105:12, 130:4, 134:6, 136:13</p> <p>maintained ^[1] - 62:15</p> <p>maintaining ^[5] - 61:9, 68:6, 69:9, 94:3, 109:12</p>			

17:11, 17:19, 18:16,
19:8, 19:15, 19:20,
20:6, 20:12, 20:17,
20:22, 21:1, 22:4, 22:8,
22:15, 23:4, 24:15,
24:22, 25:15, 26:8,
26:12, 26:18, 26:20,
27:13, 27:24, 28:3,
28:20, 28:23, 29:12,
29:14, 30:2, 30:5, 30:8,
30:17, 30:21, 30:24,
32:3, 32:13, 33:4,
33:18, 34:4, 34:8,
34:12, 128:1, 128:20,
130:1, 130:9, 130:12,
131:23, 132:25
Mendro [6] - 1:21,
3:16, 5:7, 45:3, 128:1,
128:19
Mendro's [1] - 47:18
mention [5] - 42:20,
43:3, 50:11, 121:12,
129:23
mentioned [13] - 9:25,
10:23, 35:8, 45:3,
48:13, 59:12, 82:23,
84:5, 115:20, 117:19,
124:23, 129:8, 130:12
mentions [1] - 76:2
Merck [1] - 32:16
merely [1] - 80:25
merge [1] - 118:9
merged [1] - 94:1
Meridian [1] - 132:6
Merrill [1] - 59:18
message [1] - 69:20
messages [1] - 86:23
met [5] - 74:9, 97:9,
120:12, 120:18, 133:15
metals [2] - 55:3, 69:7
method [1] - 67:20
might [12] - 15:8,
16:23, 18:22, 25:9,
31:13, 33:22, 66:7,
77:19, 77:20, 121:8,
123:24, 126:20
millions [1] - 123:12
mind [4] - 10:8, 22:12,
121:16, 122:12
minds [1] - 129:2
mini [1] - 104:17
minimum [1] - 135:8
ministerial [5] - 108:5,
109:24, 133:21,
133:22, 135:10
minute [6] - 25:5,
65:9, 84:3, 119:21,
135:3, 136:19
minutes [3] - 55:7,
126:21, 127:25

mischaracterizes [1] -
72:21
misleading [2] -
70:17, 118:11
miss [2] - 22:7, 28:22
missed [2] - 43:2,
123:5
missing [3] - 47:24,
57:22, 122:17
misunderstanding [1]
- 56:13
misunderstood [1] -
133:10
model [1] - 121:1
moment [6] - 9:25,
27:25, 70:6, 71:20,
79:11, 95:17
money [34] - 9:10,
17:7, 20:25, 21:1, 21:2,
22:11, 24:24, 25:18,
25:19, 26:22, 27:15,
28:8, 45:7, 45:15,
53:11, 53:14, 56:25,
57:18, 57:20, 74:1,
85:2, 85:6, 85:20,
92:11, 92:12, 92:16,
92:18, 108:8, 112:24,
113:9, 123:13, 123:17,
130:9
money-making [1] -
9:10
month [2] - 123:16,
128:14
months [1] - 61:12
morning [16] - 3:1,
3:8, 3:14, 3:16, 3:21,
3:22, 4:2, 4:6, 5:8, 5:9,
44:21, 44:22, 60:6,
60:13, 60:14, 137:15
Morrison [26] - 38:22,
39:6, 39:16, 39:22,
40:4, 40:6, 40:8, 40:10,
40:11, 40:16, 40:17,
40:19, 43:21, 44:9,
44:11, 65:20, 115:16,
115:21, 115:22, 116:6,
116:9, 117:21, 117:24,
118:3
Morrison's [1] - 118:5
most [11] - 15:4,
47:12, 54:24, 63:1,
65:19, 76:16, 77:15,
95:22, 120:8, 133:15,
133:16
Most [1] - 8:3
mostly [1] - 128:8
motion [10] - 32:14,
36:17, 36:25, 37:17,
37:20, 65:6, 116:13,
126:23, 135:15, 137:8

motions [1] - 4:21
MOTIONS [2] - 1:5,
1:9
mouth [1] - 35:13
move [2] - 58:7, 62:25
moved [2] - 38:12,
76:12
moves [1] - 60:9
MR [166] - 3:8, 3:16,
3:22, 4:2, 5:8, 5:23,
6:6, 6:8, 6:21, 8:9,
8:17, 9:18, 10:20, 11:8,
11:20, 12:4, 12:22,
13:17, 14:3, 14:7, 14:9,
14:12, 14:24, 15:1,
15:12, 15:18, 15:24,
16:10, 17:11, 17:19,
18:16, 19:8, 19:15,
19:20, 20:6, 20:12,
20:17, 20:22, 21:1,
22:4, 22:8, 22:15, 23:4,
24:15, 24:22, 25:15,
26:8, 26:12, 26:18,
26:20, 27:13, 27:24,
28:3, 28:20, 28:23,
29:12, 29:14, 30:2,
30:5, 30:8, 30:17,
30:21, 30:24, 32:3,
32:13, 33:4, 33:18,
34:4, 34:8, 34:12,
34:14, 35:7, 35:20,
36:18, 37:4, 37:17,
38:1, 38:12, 38:18,
38:21, 39:6, 40:11,
41:1, 41:11, 42:6,
42:19, 43:11, 43:23,
44:3, 44:16, 44:21,
45:2, 45:22, 46:15,
47:16, 48:3, 48:6, 48:9,
48:11, 48:25, 49:13,
50:8, 51:6, 51:18, 52:3,
52:5, 52:17, 52:23,
53:13, 53:23, 54:11,
55:21, 56:2, 56:13,
56:19, 57:16, 58:2,
58:21, 60:7, 60:20,
61:5, 61:24, 64:6,
64:16, 65:4, 115:12,
115:19, 116:1, 116:7,
118:2, 118:13, 118:16,
118:19, 118:25, 119:3,
119:7, 119:14, 119:18,
119:20, 120:4, 120:15,
122:12, 123:3, 125:14,
126:10, 126:14,
126:19, 127:5, 127:8,
127:12, 128:1, 128:20,
130:1, 130:9, 130:12,
131:23, 132:25, 133:1,
133:6, 133:10, 133:20,

134:14, 136:19,
136:21, 136:25, 137:13
MS [92] - 65:14, 65:17,
66:4, 66:9, 66:17, 67:1,
67:11, 67:23, 68:16,
69:5, 69:13, 70:6, 70:9,
70:15, 70:22, 71:1,
71:8, 71:11, 71:16,
71:20, 72:11, 74:6,
74:15, 75:21, 76:4,
77:2, 77:22, 78:4,
78:25, 79:9, 81:15,
82:6, 82:16, 83:1, 83:6,
83:14, 84:9, 84:21,
85:4, 85:16, 86:4,
87:12, 88:8, 88:13,
89:22, 90:5, 90:9,
91:16, 92:14, 94:6,
94:23, 95:18, 96:14,
97:8, 97:17, 97:20,
99:4, 99:7, 99:10,
100:1, 101:5, 101:18,
101:24, 102:10,
102:16, 103:3, 103:12,
104:1, 104:5, 105:9,
106:2, 106:19, 107:15,
108:14, 109:19, 110:4,
111:19, 112:14, 113:2,
113:24, 114:5, 114:10,
115:4, 134:6, 134:9,
134:17, 134:21,
134:25, 135:5, 135:21,
136:3, 136:6
Muchin [1] - 2:2
multi [2] - 30:25, 62:2
multi-trillion [1] -
30:25
multi-year [1] - 62:2
multiple [3] - 35:3,
44:6, 49:11
Murphy [3] - 1:18,
3:11, 119:21
MURPHY [8] - 119:20,
120:4, 120:15, 122:12,
123:3, 125:14, 126:10,
126:14
must [8] - 7:3, 27:22,
73:21, 77:15, 116:11,
127:3, 127:15, 132:6

N

N.W [1] - 138:13
name [1] - 80:19
named [1] - 50:12
narrow [1] - 29:24
narrowed [1] - 9:16
Nasse [2] - 1:15, 3:13
natural [3] - 11:15,
54:1, 55:2

<p>nature [5] - 39:15, 47:1, 68:9, 97:5, 111:17</p> <p>NE [1] - 1:16</p> <p>nearly [1] - 32:15</p> <p>necessarily [6] - 12:19, 68:1, 68:15, 80:21, 92:8, 132:17</p> <p>necessary [7] - 11:25, 45:21, 46:6, 57:13, 81:23, 105:4, 130:4</p> <p>need [36] - 4:19, 5:4, 15:15, 23:24, 30:9, 42:4, 44:24, 45:5, 47:17, 53:24, 65:16, 67:6, 72:22, 76:8, 83:16, 88:21, 96:15, 98:16, 99:5, 105:4, 105:7, 106:3, 106:25, 107:23, 112:15, 112:17, 119:23, 120:10, 123:22, 123:23, 127:15, 127:17, 127:21, 127:23, 133:13</p> <p>needed [3] - 78:15, 91:8, 125:5</p> <p>needs [1] - 81:3</p> <p>nefarious [1] - 8:1</p> <p>Nelson [2] - 1:21, 3:20</p> <p>network [1] - 111:1</p> <p>Network [1] - 82:10</p> <p>never [11] - 6:24, 21:24, 22:9, 22:10, 22:15, 41:12, 42:14, 47:25, 57:20, 76:2, 127:3</p> <p>new [12] - 12:14, 12:18, 37:10, 43:14, 63:7, 87:21, 87:23, 90:14, 90:17, 90:20, 125:9, 127:14</p> <p>New [6] - 1:19, 7:24, 10:1, 21:20, 74:10, 137:1</p> <p>next [3] - 34:7, 60:8, 119:17</p> <p>nice [1] - 93:21</p> <p>Ninth [2] - 8:14, 8:18</p> <p>nobody [3] - 35:5, 130:6</p> <p>non [3] - 128:7, 128:11, 130:5</p> <p>non-securities [3] - 128:7, 128:11, 130:5</p> <p>none [2] - 45:7, 113:12</p> <p>notably [2] - 73:10, 73:20</p> <p>note [13] - 14:19, 67:24, 74:22, 92:17,</p>	<p>95:19, 113:14, 124:8, 129:9, 130:14, 134:17, 135:5, 135:8, 136:6</p> <p>noted [3] - 7:25, 59:9, 97:1</p> <p>notes [5] - 29:17, 80:18, 98:12, 123:4, 138:6</p> <p>nothing [8] - 7:10, 28:17, 50:8, 64:20, 66:23, 93:4, 106:6, 121:25</p> <p>notice [11] - 35:6, 36:18, 36:22, 37:19, 50:10, 50:18, 71:9, 121:7, 121:8, 122:6, 123:22</p> <p>noticed [2] - 26:11, 80:17</p> <p>notified [1] - 50:13</p> <p>notion [3] - 22:24, 27:11, 74:13</p> <p>notwithstanding [3] - 8:5, 8:6, 80:4</p> <p>nowhere [3] - 35:6, 73:18, 125:10</p> <p>number [14] - 30:22, 49:6, 55:7, 68:23, 72:17, 81:15, 81:24, 81:25, 84:12, 86:17, 88:20, 98:7, 110:18, 117:12</p> <p>numbers [2] - 49:21, 117:11</p> <p>numerous [1] - 6:9</p> <p>NW [4] - 1:23, 2:3, 2:7, 2:11</p> <p>NY [1] - 1:19</p>	<p>occurring [2] - 77:12, 92:20</p> <p>occurs [1] - 43:20</p> <p>October [1] - 111:4</p> <p>OF [3] - 1:1, 1:9, 138:2</p> <p>offensive [1] - 32:19</p> <p>offer [20] - 7:15, 10:7, 70:19, 70:24, 72:16, 79:2, 79:17, 79:21, 85:8, 96:8, 98:7, 100:17, 101:11, 104:22, 108:21, 115:1, 115:2, 116:17, 117:16</p> <p>offered [23] - 9:12, 66:21, 67:2, 72:1, 72:4, 83:7, 84:11, 94:18, 100:6, 100:21, 101:13, 101:18, 101:21, 102:10, 102:13, 103:10, 105:14, 106:9, 110:10, 110:22, 117:9, 129:16, 129:17</p> <p>offering [18] - 14:23, 21:13, 22:18, 35:11, 40:22, 41:2, 55:12, 60:17, 78:11, 79:22, 106:3, 114:20, 114:21, 116:2, 116:15, 117:9, 117:17, 129:14</p> <p>offerings [3] - 83:1, 130:2, 130:3</p> <p>offers [6] - 39:4, 45:14, 79:20, 100:9, 117:23, 118:22</p> <p>office [2] - 62:20, 62:22</p> <p>Office [1] - 46:23</p> <p>OFFICIAL [1] - 138:2</p> <p>Official [2] - 2:10, 138:12</p> <p>offshore [1] - 117:23</p> <p>often [2] - 9:11, 78:5</p> <p>oil [3] - 7:9, 54:1, 55:2</p> <p>once [7] - 5:5, 21:24, 88:11, 89:12, 89:23, 116:12</p> <p>One [2] - 85:5</p> <p>one [79] - 5:20, 6:16, 17:23, 19:18, 20:17, 21:10, 22:20, 23:2, 23:3, 25:5, 25:17, 27:9, 27:25, 30:2, 31:19, 31:23, 34:17, 37:22, 38:16, 43:16, 46:5, 49:25, 50:3, 51:4, 53:22, 55:25, 56:8, 56:11, 57:16, 57:25, 58:18, 59:20, 61:6, 61:8, 63:6, 64:9, 66:6, 69:3, 69:5, 69:13, 70:6,</p>	<p>70:13, 71:8, 71:20, 74:8, 75:11, 75:22, 76:10, 76:22, 77:2, 82:7, 82:9, 82:23, 84:5, 84:10, 87:5, 89:19, 91:24, 96:10, 102:14, 104:20, 105:8, 107:25, 111:20, 111:21, 113:22, 117:6, 117:20, 117:22, 119:11, 120:3, 122:9, 129:1, 131:16, 134:1, 135:2, 136:16, 136:19</p> <p>One-O-One [1] - 85:5</p> <p>ones [8] - 17:10, 52:7, 52:19, 77:4, 80:25, 83:17, 83:18, 107:10</p> <p>ongoing [26] - 7:13, 43:5, 68:17, 69:10, 69:21, 71:24, 72:13, 77:9, 77:11, 90:10, 90:19, 91:3, 91:5, 92:17, 93:16, 95:6, 95:11, 106:7, 108:20, 109:17, 110:15, 112:2, 112:3, 128:8, 128:13</p> <p>online [1] - 55:7</p> <p>open [1] - 76:9</p> <p>opening [1] - 46:16</p> <p>operate [1] - 33:1</p> <p>operated [1] - 70:18</p> <p>operating [3] - 60:25, 105:24, 112:23</p> <p>operational [1] - 103:21</p> <p>opine [1] - 4:18</p> <p>opinion [8] - 9:5, 14:14, 26:2, 76:1, 87:6, 97:22, 97:23, 137:1</p> <p>opinions [4] - 11:21, 25:6, 98:8</p> <p>opportunities [12] - 73:12, 100:18, 100:21, 101:11, 101:14, 102:8, 102:12, 103:19, 109:4, 110:10, 114:23, 115:6</p> <p>opportunity [11] - 5:2, 34:9, 46:12, 67:3, 90:20, 91:22, 96:23, 100:6, 100:10, 101:19, 102:11</p> <p>opposed [11] - 9:13, 10:15, 13:6, 17:3, 56:11, 66:25, 78:23, 102:13, 115:9, 122:21, 126:3</p> <p>opposite [3] - 43:13, 71:6, 79:25</p> <p>opposition [1] - 62:13</p> <p>option [4] - 6:25,</p>
O			
<p>O'Connor's [1] - 9:5</p> <p>objective [1] - 77:24</p> <p>obligation [10] - 7:13, 7:19, 10:15, 11:7, 29:15, 36:21, 79:10, 79:19, 85:23, 104:1</p> <p>obligations [12] - 6:11, 10:9, 11:2, 11:25, 15:6, 19:16, 24:8, 27:17, 27:23, 28:15, 81:23, 106:4</p> <p>obvious [4] - 71:5, 81:7, 122:15, 123:17</p> <p>obviously [5] - 5:24, 23:6, 25:3, 30:24, 110:14</p> <p>occur [1] - 99:16</p> <p>occurred [4] - 39:11, 40:2, 40:12, 61:12</p>			

74:12, 74:14, 131:4
orange [3] - 31:18, 48:8, 48:11
order [3] - 50:14, 60:16, 114:3
ordinarily [2] - 26:25, 74:9
ordinary [1] - 95:12
organize [1] - 65:16
organized [2] - 4:22, 65:23
original [6] - 51:24, 94:2, 105:20, 107:8, 116:5, 122:11
originally [1] - 4:24
otherwise [8] - 13:19, 16:25, 17:13, 39:20, 53:25, 59:21, 101:22, 118:14
ought [1] - 63:16
outlined [1] - 29:24
outlining [1] - 101:6
outs [1] - 124:15
outset [7] - 22:17, 78:1, 88:7, 96:11, 102:23, 104:4
outside [8] - 13:12, 18:7, 18:10, 41:16, 44:5, 73:1, 108:25, 115:18
overlapping [1] - 113:3
overruled [1] - 121:23
overstate [1] - 111:20
overturned [1] - 40:8
overwhelming [1] - 122:5
overwhelms [1] - 133:23
Owen [1] - 98:20
own [10] - 6:20, 16:16, 43:21, 44:13, 57:1, 83:10, 103:16, 103:20, 112:1, 132:10
owner [1] - 92:13
owners [1] - 111:13
ownership [1] - 26:23

P

package [2] - 100:6, 114:23
page [9] - 7:15, 27:22, 28:4, 28:24, 30:5, 30:22, 62:13, 129:11, 133:12
pages [8] - 5:10, 26:9, 46:20, 104:15, 107:6, 112:6, 123:1
Paibas [1] - 116:21

paper [5] - 17:4, 65:17, 78:6, 78:7, 82:5
papers [6] - 5:6, 14:20, 17:24, 25:11, 71:21, 78:5
paradigm [1] - 103:2
paragraph [20] - 4:12, 26:21, 31:1, 41:17, 45:10, 62:18, 62:19, 63:6, 63:14, 63:19, 63:20, 71:25, 72:3, 100:23, 129:20, 130:22, 131:2, 131:7, 132:15, 133:21
paragraphs [10] - 4:12, 26:10, 45:13, 62:14, 62:18, 62:21, 63:2, 72:8, 129:16, 132:11
part [21] - 10:16, 11:3, 13:23, 16:10, 18:23, 19:16, 21:13, 21:16, 33:1, 38:3, 55:11, 59:5, 90:10, 96:14, 106:18, 114:11, 115:2, 116:25, 123:11, 136:8
participate [2] - 100:7, 100:10
participating [1] - 89:10
particular [62] - 18:15, 25:13, 32:18, 35:23, 38:2, 38:5, 47:14, 51:21, 55:2, 58:11, 59:20, 66:15, 66:22, 67:8, 68:7, 68:20, 72:13, 73:5, 73:25, 74:18, 75:5, 75:12, 77:6, 77:22, 78:9, 81:6, 82:3, 82:16, 83:1, 83:7, 83:15, 83:20, 83:21, 84:11, 88:22, 92:22, 93:9, 93:25, 94:10, 94:13, 96:25, 98:22, 100:21, 101:12, 101:25, 102:7, 102:8, 102:17, 103:3, 104:22, 106:5, 107:1, 107:10, 108:14, 108:17, 109:2, 109:9, 110:11, 110:13, 113:4, 114:5
particularly [1] - 108:25
parties [13] - 3:3, 10:8, 49:15, 64:9, 79:24, 90:15, 99:11, 104:18, 106:17, 106:18, 107:2, 111:15, 129:19
Partner [1] - 128:5
Partners [24] - 8:13,

11:1, 11:6, 11:8, 12:1, 19:20, 21:3, 27:22, 30:6, 45:4, 45:19, 45:24, 46:7, 57:22, 68:12, 75:7, 75:23, 76:7, 76:11, 83:18, 129:9, 133:12, 135:9, 136:14
party [14] - 23:17, 24:3, 27:9, 27:13, 27:18, 38:6, 51:10, 76:21, 78:8, 88:18, 96:22, 104:13, 129:1, 129:2
passed [1] - 5:13
passing [1] - 28:13
past [5] - 21:24, 36:11, 54:24, 75:8, 90:21
path [2] - 35:16, 36:7
paths [1] - 118:8
patience [1] - 137:14
patient [1] - 128:2
pattern [1] - 96:21
pause [1] - 28:2
Pause [1] - 70:8
pay [4] - 26:1, 103:1, 103:24, 104:1
paying [7] - 7:17, 20:23, 21:5, 25:25, 34:23, 132:13
payment [1] - 131:5
payments [3] - 130:12, 130:22, 130:23
pays [2] - 9:21, 102:20
Pearl [1] - 1:19
peg [1] - 117:3
pegged [1] - 66:24
pegging [1] - 100:4
penalty [1] - 73:6
Pennsylvania [1] - 2:3
people [25] - 14:17, 18:5, 18:18, 18:19, 18:20, 18:21, 22:21, 25:8, 33:1, 34:23, 36:6, 46:4, 47:22, 53:4, 55:4, 55:7, 57:1, 57:3, 91:12, 95:22, 107:22, 110:1, 122:22, 124:17, 127:1
people's [2] - 18:9, 32:11
percent [2] - 100:11, 100:25
percentage [2] - 103:10, 104:4
perfect [1] - 120:22
perfectly [1] - 56:3
performing [2] - 102:11, 130:24
perhaps [3] - 16:18, 43:13, 110:13

period [14] - 37:8, 37:12, 41:9, 41:13, 41:15, 41:25, 42:14, 42:21, 42:22, 88:5, 109:18, 136:22, 137:4, 137:9
periodically [1] - 82:9
periods [2] - 73:23, 102:22
permit [1] - 46:10
permitting [1] - 84:18
perpetuity [1] - 102:14
person [7] - 28:19, 62:8, 64:10, 64:12, 65:17, 74:1, 117:23
personal [17] - 25:21, 38:10, 60:18, 64:1, 65:6, 73:8, 73:15, 112:18, 115:8, 118:23, 119:25, 120:5, 120:19, 120:21, 121:6, 121:19, 127:17
personally [5] - 61:2, 64:15, 64:17, 120:13, 120:14
perspective [2] - 61:24, 117:21
persuasive [3] - 4:13, 34:17, 125:10
pertains [2] - 71:22, 72:20
phone [1] - 22:14
phrasing [1] - 45:23
physical [3] - 41:14, 42:10, 137:6
picture [2] - 122:5, 122:10
piece [1] - 94:15
pivot [1] - 63:9
place [5] - 18:1, 18:4, 58:12, 58:25, 87:20
plain [2] - 81:3, 109:14
plaintiff [3] - 3:5, 3:9, 77:16
Plaintiff [2] - 1:4, 1:13
plaintiffs [1] - 13:9
plan [3] - 79:2, 106:21, 108:21
planned [1] - 79:6
planning [3] - 29:17, 82:21, 126:17
plans [1] - 18:17
Plastic [6] - 59:18, 59:19, 60:3, 86:9, 86:21, 87:1
platform [38] - 16:7, 17:8, 17:20, 21:15, 25:20, 44:7, 45:7, 45:11, 52:7, 53:18, 55:14, 56:5, 57:1,

57:20, 63:17, 64:20,
72:6, 72:8, 76:24, 77:8,
79:8, 89:18, 90:14,
91:1, 92:6, 95:22,
97:21, 98:15, 105:2,
105:15, 105:24, 106:1,
108:9, 108:17, 109:11,
110:1, 120:24, 121:24
platforms [14] - 17:17,
41:22, 63:4, 63:8,
64:22, 84:1, 88:10,
89:5, 98:23, 107:1,
108:3, 108:4, 120:23,
120:24
plausible [1] - 120:11
plausibly [5] - 22:2,
64:4, 64:6, 117:15,
126:5
play [2] - 55:9, 61:7
plea [1] - 60:24
plead [1] - 129:15
pleadings [2] - 4:16,
34:20
pleas [2] - 61:8, 61:11
pleases [1] - 19:24
pled [1] - 61:9
plot [1] - 36:3
plus [1] - 53:25
point [50] - 6:1, 13:10,
15:16, 16:20, 20:6,
20:7, 20:18, 22:21,
30:5, 33:3, 34:8, 43:24,
48:22, 50:25, 57:19,
69:6, 69:17, 73:14,
73:19, 75:22, 78:5,
80:14, 81:8, 82:18,
84:20, 86:5, 94:24,
96:18, 98:8, 99:12,
105:5, 106:11, 111:17,
114:20, 119:9, 122:4,
122:14, 126:10, 128:3,
129:21, 129:24,
130:14, 131:16,
131:21, 131:24,
132:21, 134:15,
134:18, 134:24, 136:21
pointed [7] - 39:12,
39:13, 42:21, 62:7,
82:7, 84:22, 125:2
pointing [4] - 9:15,
9:19, 39:23, 123:17
points [8] - 34:6,
35:18, 36:16, 92:16,
107:7, 126:21, 133:3,
133:4
Pokémon [3] - 32:6,
46:19, 80:7
policy [2] - 36:9, 36:14
political [1] - 31:3
pool [3] - 21:4, 22:11,

103:17
pooled [7] - 24:24,
97:12, 100:24, 100:25,
101:8, 110:20, 130:9
pooling [24] - 21:5,
22:16, 24:9, 27:15,
45:4, 45:6, 45:18,
45:19, 45:24, 46:3,
46:6, 53:13, 57:19,
75:6, 75:8, 75:12,
75:19, 83:25, 92:24,
97:6, 97:11, 133:21,
136:7
popular [1] - 33:2
portion [7] - 40:5,
40:8, 72:15, 77:22,
101:1, 101:8, 134:4
position [21] - 8:8, 8:9,
32:16, 38:2, 38:25,
47:10, 50:20, 64:2,
64:23, 66:2, 66:5, 66:6,
71:7, 87:10, 89:25,
90:2, 90:4, 94:7, 94:9,
107:24
positions [4] - 32:11,
36:10, 73:15, 79:25
possibility [1] - 74:12
possible [2] - 11:23,
52:17
possibly [1] - 128:25
post [10] - 11:2, 15:6,
16:12, 19:15, 27:16,
27:23, 39:16, 111:23,
133:13, 133:20
post-Morrison [1] -
39:16
post-purchase [2] -
133:13, 133:20
post-sale [6] - 11:2,
15:6, 16:12, 19:15,
27:16, 27:23
postdates [1] - 35:8
posted [1] - 63:7
potential [1] - 72:6
potentially [1] - 47:22
power [2] - 14:15,
124:11
powerful [1] - 63:2
practical [1] - 106:24
practices [1] - 70:18
pre [4] - 30:10, 30:15,
37:1, 133:17
pre-2019 [1] - 37:2
pre-purchase [3] -
30:10, 30:15, 133:17
preceded [1] - 40:6
precedent [2] - 11:9,
39:16
precious [1] - 69:7
predates [1] - 23:13

predicated [1] - 62:8
predicating [1] - 82:11
predominantly [1] -
30:11
preferences [1] -
37:14
premise [2] - 123:9,
125:19
premising [1] - 39:10
preprogrammed [2] -
82:12, 82:13
presale [2] - 111:23
presence [6] - 39:13,
41:14, 42:10, 42:15,
60:1, 137:6
present [13] - 3:4,
30:8, 45:6, 71:25, 75:4,
76:7, 81:19, 90:21,
91:4, 91:19, 95:17,
101:24, 134:11
presentation [1] -
130:13
press [2] - 50:12,
55:16
pressed [2] - 24:4,
80:5
pretty [5] - 41:21,
42:9, 80:18, 90:4,
135:17
prevent [1] - 13:10
preventing [1] - 35:16
previously [3] - 75:3,
97:10, 134:7
price [5] - 14:13, 54:9,
88:3, 88:6, 108:1
prima [1] - 63:25
primarily [1] - 74:16
primary [5] - 5:4,
71:24, 72:13, 93:6,
99:19
principally [1] - 33:23
principle [7] - 25:2,
46:17, 49:1, 54:22,
57:15, 59:7, 108:19
principles [2] - 80:6,
90:24
private [5] - 13:6,
13:9, 98:19, 98:22,
98:24
privy [7] - 10:7,
25:17, 79:10, 81:18,
81:19, 128:25, 130:4
privy [1] - 25:23
pro [1] - 51:13
problem [7] - 5:17,
24:15, 32:6, 36:5,
58:18, 58:20, 128:5
problems [1] - 106:16
proceed [2] - 124:12,
124:20

proceeded [1] - 20:7
proceeding [1] - 115:9
proceedings [2] -
124:9, 138:7
proceeds [13] - 16:15,
16:22, 18:21, 19:21,
19:22, 19:23, 23:8,
23:10, 23:18, 48:15,
52:13, 79:7, 100:24
Process [1] - 37:18
process [9] - 34:16,
71:9, 73:12, 122:25,
134:12, 136:9, 136:21,
137:3, 137:5
process-related [1] -
122:25
product [3] - 59:21,
91:6, 114:14
products [12] - 47:20,
49:4, 49:5, 52:13, 54:2,
54:16, 63:7, 93:14,
104:23, 106:4, 113:4,
113:25
profit [15] - 24:17,
25:3, 57:2, 66:8, 67:3,
89:2, 99:22, 99:23,
100:7, 101:12, 101:14,
101:19, 102:8, 102:12,
115:6
profit-making [6] -
100:7, 101:12, 101:14,
101:19, 102:8, 102:12
profit-yielding [1] -
67:3
profitability [5] -
86:23, 91:22, 93:1,
93:8, 133:14
profits [23] - 6:16,
21:4, 24:19, 28:10,
30:11, 76:20, 82:22,
86:12, 87:9, 88:15,
88:24, 95:10, 96:20,
100:22, 103:8, 103:23,
104:10, 106:8, 108:16,
110:15, 111:9, 123:18
program [11] - 45:1,
61:10, 83:7, 83:24,
102:19, 102:20, 104:3,
133:2, 135:6, 135:18,
136:2
programmatic [2] -
97:20, 97:25
programs [31] - 26:6,
26:13, 27:6, 68:19,
68:23, 83:4, 83:14,
83:15, 83:21, 84:3,
84:7, 84:12, 87:22,
90:14, 90:17, 100:7,
100:10, 100:18,
101:14, 101:25,

102:19, 103:4, 103:5, 104:5, 104:7, 115:3, 131:17, 131:25, 132:1, 132:4, 135:6
project [2] - 7:18, 88:22
promise [8] - 78:15, 89:7, 91:18, 92:25, 94:15, 95:5, 111:3, 123:18
promises [2] - 86:19, 110:15
promising [2] - 57:4, 109:13
promote [2] - 25:20, 101:1
promoted [2] - 47:22, 78:12
promoter [6] - 11:3, 15:23, 19:16, 24:2, 28:25, 87:10
promoters [5] - 69:18, 75:2, 93:2, 95:4, 109:11
promoters' [1] - 57:21
promotion [8] - 47:23, 53:17, 67:12, 90:11, 105:20, 115:6, 128:9
promotional [1] - 78:21
promotions [2] - 95:4, 95:18
prong [3] - 22:10, 85:6, 92:18
proof [1] - 79:7
proof-of-stake [1] - 79:7
property [1] - 95:6
proposals [1] - 31:6
proposed [3] - 37:23, 37:25, 53:6
proposition [10] - 7:6, 8:11, 8:21, 8:25, 11:15, 103:8, 103:9, 111:8, 111:10, 112:4
protect [2] - 12:17, 73:9
protected [1] - 79:17
protection [2] - 113:10, 113:11
protections [2] - 79:15, 124:5
Protocol [2] - 100:19, 110:18
protocol [4] - 79:7, 108:18, 133:16, 133:24
protocols [3] - 68:7, 68:19, 68:24
prove [1] - 63:25
proved [1] - 29:6

provide [5] - 36:22, 73:8, 84:13, 85:6, 85:11
provided [3] - 46:22, 87:5, 100:17
provides [2] - 100:5, 101:11
provision [9] - 40:17, 73:4, 85:7, 98:24, 116:8, 118:5, 118:6, 118:15, 118:17
provisions [6] - 10:4, 10:24, 58:23, 59:22, 115:23, 118:21
prudently [1] - 125:17
Public [1] - 78:3
public [16] - 12:18, 17:4, 17:6, 25:8, 31:5, 36:4, 36:22, 37:3, 37:4, 37:8, 47:14, 50:15, 72:10, 77:20, 110:25, 123:15
publicly [3] - 50:15, 78:12, 95:19
puffery [1] - 17:16
pull [1] - 98:12
purchase [16] - 6:16, 17:3, 30:10, 30:15, 46:1, 46:2, 46:4, 46:5, 47:24, 86:18, 92:20, 92:25, 103:4, 133:13, 133:17, 133:20
purchased [3] - 98:22, 111:3, 112:5
purchaser [3] - 7:17, 53:15, 53:16
purchasers [11] - 70:19, 81:19, 81:20, 87:23, 90:20, 93:5, 97:13, 100:6, 100:24, 101:7, 109:2
purchases [4] - 75:13, 81:20, 97:12, 98:14
purchasing [1] - 72:7
purpose [2] - 13:2
purposeful [1] - 116:4
purposefully [1] - 61:17
purposes [14] - 30:9, 31:11, 33:23, 36:25, 37:17, 72:17, 73:15, 73:17, 73:20, 83:11, 101:24, 103:21, 134:11
pursuant [1] - 110:24
pursue [1] - 106:25
purview [1] - 47:20
push [1] - 90:18
put [10] - 9:6, 9:8, 40:18, 43:25, 58:5, 58:25, 62:4, 82:2,

121:6, 127:11
Puts [1] - 97:19
puts [1] - 66:13
putting [3] - 20:13, 102:3, 105:22

Q

qualifies [2] - 29:23, 70:11
qualify [3] - 48:21, 53:23, 135:19
quality [1] - 4:7
query [1] - 46:21
questioned [1] - 49:9
questions [28] - 4:11, 4:17, 4:22, 13:20, 15:14, 15:15, 20:4, 22:4, 29:19, 29:21, 30:1, 30:24, 31:4, 31:11, 32:22, 33:8, 34:16, 38:3, 54:23, 78:10, 115:13, 119:4, 119:8, 119:24, 124:24, 132:23, 135:18, 137:16
quibble [1] - 100:3
quite [6] - 9:18, 26:13, 50:9, 52:10, 96:4, 99:19
quote [3] - 4:19, 5:19, 30:22
quote/unquote [4] - 75:8, 86:10, 92:16, 136:11
quoted [3] - 4:15, 7:15, 63:21
quoting [1] - 6:22
QURESHI [7] - 4:2, 60:20, 61:5, 61:24, 64:6, 64:16, 65:4
Qureshi [3] - 2:5, 4:3, 60:12

R

raise [1] - 109:8
raised [4] - 42:20, 99:14, 131:20, 132:21
Rakoff [4] - 99:18, 100:16, 102:2, 102:3
Rakoff's [2] - 87:6, 114:24
rare [1] - 55:3
rata [1] - 51:13
rate [1] - 102:22
rather [1] - 118:22
ration [1] - 80:8
reach [11] - 12:18, 31:15, 34:2, 42:4, 76:8, 81:1, 81:6, 91:7, 98:16,

120:8, 123:23
reached [2] - 39:14, 49:23
reaches [1] - 57:21
read [8] - 6:13, 39:7, 57:7, 57:9, 80:24, 81:3, 112:15, 131:9
reading [3] - 25:11, 28:16, 102:5
reads [2] - 54:25, 55:1
real [4] - 13:4, 59:6, 97:5, 132:5
realities [8] - 66:20, 67:12, 79:2, 85:24, 88:1, 101:7, 109:7, 110:9
realize [1] - 60:24
really [20] - 9:16, 17:17, 18:13, 22:16, 53:12, 57:10, 63:1, 73:4, 88:19, 107:17, 109:3, 115:23, 124:10, 124:17, 127:16, 127:20, 135:11, 136:8, 136:17
reason [26] - 15:25, 17:6, 17:7, 18:14, 18:17, 19:17, 19:21, 25:17, 27:11, 27:19, 28:8, 31:2, 32:15, 33:11, 35:10, 43:4, 44:1, 54:5, 56:22, 59:16, 61:10, 61:25, 77:3, 130:7
reasonable [19] - 19:4, 24:19, 25:8, 28:10, 76:25, 77:2, 77:14, 77:18, 77:25, 82:22, 88:15, 88:23, 95:9, 95:10, 95:15, 96:20, 106:8, 108:16, 124:21
reasonableness [1] - 96:19
reasonably [2] - 77:20, 92:5
reasoning [3] - 23:9, 23:14, 28:5
reasons [10] - 15:19, 45:2, 45:3, 46:15, 57:16, 58:21, 59:20, 61:5, 103:19, 134:7
rebut [1] - 126:24
rebuttal [5] - 34:10, 44:17, 126:20, 126:25
receipt [1] - 85:11
receive [2] - 18:20, 131:2
received [1] - 5:10
recent [5] - 22:19, 49:7, 98:11, 98:13,

116:10
recently [1] - 37:5
recess [1] - 65:11
recognized [4] - 71:11, 73:7, 75:7, 114:12
recollection [1] - 74:17
reconciles [1] - 79:19
record [6] - 3:6, 33:4, 33:6, 44:5, 80:3, 97:25
refer [3] - 4:19, 63:21, 64:19
reference [7] - 76:5, 81:25, 94:24, 100:8, 112:7, 113:15
referenced [3] - 71:13, 113:17, 136:7
references [2] - 71:13, 116:16
referred [1] - 11:24
referring [5] - 22:19, 40:15, 79:24, 83:22, 115:21
refers [1] - 74:20
refined [1] - 116:9
refused [2] - 36:1
refusing [1] - 36:6
reg [3] - 117:25, 122:21, 122:23
regard [3] - 22:8, 24:19, 24:22
regarding [10] - 5:11, 12:12, 21:9, 49:24, 51:10, 51:12, 51:13, 57:19, 59:13, 116:22
regardless [1] - 59:4
regimes [1] - 113:4
register [11] - 35:14, 35:22, 36:4, 40:9, 62:7, 62:9, 104:24, 104:25, 105:1, 106:15
registered [2] - 63:17, 64:22
registration [4] - 40:13, 40:16, 104:23, 118:17
regs [1] - 124:15
regulate [8] - 33:16, 33:22, 36:12, 43:19, 43:20, 56:10, 79:20, 118:21
regulated [5] - 47:20, 49:8, 106:2, 106:3, 114:14
regulates [2] - 44:11, 47:21
regulating [1] - 33:13
Regulation [2] - 116:21, 117:22

regulation [10] - 12:14, 31:4, 35:4, 37:15, 43:19, 116:22, 117:22, 119:12, 124:7, 124:13
regulations [2] - 124:11, 124:16
regulator [1] - 123:23
regulatory [4] - 37:6, 61:7, 113:7, 115:10
rehearing [1] - 30:14
reject [2] - 13:21, 27:11
rejected [7] - 8:21, 80:11, 99:15, 102:2, 129:18, 130:18, 137:2
rejects [2] - 129:10, 130:16
relate [1] - 104:22
related [8] - 16:13, 35:11, 41:5, 78:14, 91:21, 93:14, 105:2, 122:25
relates [2] - 72:16, 85:9
relating [4] - 79:2, 83:3, 98:13, 98:21
relationship [5] - 5:15, 15:5, 81:22, 91:5, 109:17
relationships [1] - 90:15
release [1] - 53:6
released [1] - 123:16
relevance [1] - 60:1
relevant [6] - 25:16, 25:22, 41:15, 71:6, 105:15, 106:22
reliance [1] - 86:19
reliant [1] - 68:4
relied [1] - 62:4
relief [4] - 42:22, 42:24, 43:3, 134:18
relies [2] - 86:7, 116:20
rely [5] - 11:5, 47:23, 76:25, 120:17, 136:14
relying [13] - 19:9, 20:2, 20:3, 29:9, 42:3, 43:8, 43:9, 78:3, 78:20, 81:13, 82:4
remain [2] - 14:5, 24:5
remained [1] - 102:14
remains [3] - 24:18, 76:9, 101:10
remarkable [1] - 96:4
remedies [1] - 106:23
remedy [2] - 59:21, 105:16
remember [3] - 43:17,

125:8, 131:22
remind [3] - 123:24, 123:25, 125:7
reminded [1] - 124:1
reorganize [1] - 13:19
repeat [4] - 5:4, 24:21, 125:21, 132:20
repeated [2] - 30:13, 45:23
repeatedly [1] - 112:7
repeating [2] - 44:22, 51:25
reply [3] - 5:3, 46:20, 99:1
report [4] - 34:21, 48:13, 51:9, 52:9
REPORTER [6] - 8:15, 24:21, 43:22, 128:19, 136:23, 138:2
reporter [1] - 65:9
Reporter [3] - 2:9, 2:10, 138:12
repository [1] - 69:19
represent [1] - 77:10
representation [1] - 89:8
representations [9] - 55:13, 86:12, 91:20, 93:7, 93:16, 96:10, 96:23, 105:21, 106:7
representative [3] - 105:12, 105:13, 107:7
represents [6] - 10:8, 92:15, 93:3, 93:20, 97:12, 107:5
require [8] - 10:22, 12:24, 31:10, 33:25, 74:21, 91:6, 120:2, 128:13
required [11] - 7:22, 11:4, 13:13, 45:24, 62:19, 63:14, 64:22, 79:12, 81:18, 85:20, 92:19
requirement [2] - 28:9, 98:3
requires [5] - 10:14, 11:10, 22:10, 38:5, 75:6
requiring [4] - 9:20, 10:6, 19:15, 128:25
requisite [2] - 42:24, 64:17
resale [13] - 14:22, 16:3, 16:5, 27:14, 27:19, 91:8, 92:10, 93:6, 95:17, 129:10, 130:2, 131:4
resales [9] - 14:19, 16:1, 20:18, 20:22,

21:9, 24:22, 29:14, 41:4, 91:7
reselling [1] - 24:20
reserve [4] - 34:9, 44:17, 126:21, 126:24
reserving [1] - 126:24
residents [2] - 39:2, 40:7
resold [2] - 23:23, 90:3
resolution [1] - 85:17
resolutions [1] - 128:15
respect [38] - 14:18, 15:10, 19:14, 20:22, 23:10, 29:4, 29:25, 54:3, 69:15, 71:1, 72:21, 73:14, 75:3, 75:5, 81:13, 81:16, 82:3, 82:17, 87:25, 90:5, 90:11, 93:15, 94:9, 97:1, 97:10, 100:1, 103:8, 105:23, 106:5, 108:11, 108:12, 113:20, 118:20, 118:23, 120:7, 120:13, 127:21, 135:1
respectfully [1] - 135:13
respond [2] - 46:13, 134:14
response [5] - 39:5, 76:22, 128:4, 132:2, 132:3
responses [2] - 35:7, 117:2
responsive [2] - 20:4, 137:15
rest [1] - 34:19
restriction [1] - 131:3
result [4] - 24:9, 68:25, 99:16, 103:21
retain [3] - 17:9, 69:19, 69:23
retained [1] - 77:5
retains [1] - 89:13
retention [4] - 67:13, 78:11, 95:5, 111:13
retroactively [1] - 37:11
return [11] - 9:3, 9:13, 19:5, 19:22, 28:11, 29:2, 103:14, 104:6, 135:12, 136:9
returns [11] - 10:17, 12:7, 15:22, 30:18, 72:7, 100:25, 101:1, 102:24, 104:9, 109:13, 132:12
reverse [1] - 7:20

<p>reversed [1] - 7:11</p> <p>review [1] - 114:8</p> <p>reviewed [2] - 4:9, 63:25</p> <p>reviewing [1] - 7:8</p> <p>reward [4] - 83:19, 101:14, 112:8, 135:12</p> <p>rewarding [1] - 100:9</p> <p>rewards [4] - 83:25, 100:8, 100:10, 103:15</p> <p>rewrite [1] - 124:15</p> <p>rewriting [1] - 124:15</p> <p>rifling [1] - 71:21</p> <p>rights [7] - 24:1, 48:14, 48:15, 51:12, 52:12, 85:10</p> <p>Ripple [16] - 22:20, 23:6, 25:15, 35:1, 47:12, 49:15, 77:18, 77:23, 84:25, 93:22, 97:14, 97:17, 97:21, 98:21, 129:18, 130:18</p> <p>rise [11] - 68:3, 73:21, 81:24, 82:21, 86:25, 88:23, 95:9, 103:7, 103:22, 106:8, 108:16</p> <p>rises [1] - 69:23</p> <p>risk [4] - 36:15, 80:8, 130:19, 132:5</p> <p>risks [1] - 21:4</p> <p>Rivera [2] - 104:8, 130:18</p> <p>RMR [1] - 2:9</p> <p>Rodriguez [1] - 8:12</p> <p>role [2] - 55:9, 110:9</p> <p>room [1] - 126:17</p> <p>Room [2] - 2:10, 138:13</p> <p>round [1] - 117:3</p> <p>rounds [2] - 110:20, 110:22</p> <p>routinely [1] - 80:11</p> <p>Rule [1] - 36:17</p> <p>rule [4] - 4:17, 32:18, 89:11, 124:18</p> <p>rule-making [1] - 124:18</p> <p>ruled [2] - 8:4, 120:24</p> <p>rulemaking [2] - 36:21, 124:18</p> <p>rules [3] - 82:12, 82:13, 129:3</p> <p>ruling [1] - 131:12</p> <p>run [3] - 72:23, 130:19, 134:10</p> <p>running [1] - 137:3</p>	<p>16:12, 19:15, 20:15, 22:2, 22:8, 27:16, 27:23, 34:22, 48:22, 52:1, 67:9, 70:19, 70:24, 72:16, 79:2, 79:17, 88:10, 89:16, 91:15, 93:6, 93:25, 100:17, 101:11, 101:16, 102:6, 104:22, 109:25, 111:25, 116:17, 128:22</p> <p>sales [47] - 5:25, 21:11, 21:13, 21:17, 21:21, 22:7, 23:8, 23:11, 23:19, 25:10, 39:4, 41:2, 41:6, 49:24, 52:8, 59:13, 71:24, 72:10, 72:12, 72:13, 72:17, 79:20, 79:22, 86:22, 90:2, 92:1, 97:5, 97:16, 97:18, 97:20, 97:21, 97:22, 97:24, 97:25, 98:5, 98:7, 98:8, 98:9, 99:14, 99:17, 99:20, 105:10, 110:20, 110:25, 118:22, 129:13, 129:15</p> <p>sample [2] - 105:13</p> <p>satisfied [2] - 28:11, 85:7</p> <p>satisfies [1] - 110:16</p> <p>satisfy [7] - 22:9, 22:10, 52:21, 106:4, 120:19, 120:20, 136:13</p> <p>save [2] - 65:25, 118:1</p> <p>savings [2] - 132:16, 132:17</p> <p>saw [1] - 46:11</p> <p>scale [1] - 112:11</p> <p>scales [1] - 23:7</p> <p>SCARLATO [13] - 115:12, 115:19, 116:1, 116:7, 118:2, 118:13, 118:16, 118:19, 118:25, 119:3, 119:7, 119:14, 119:18</p> <p>Scarlato [2] - 1:13, 3:11</p> <p>scenario [1] - 109:3</p> <p>scheme [11] - 5:20, 5:21, 6:12, 7:25, 9:10, 9:11, 9:12, 31:21, 41:22, 61:7, 115:5</p> <p>schemes [2] - 6:6, 8:2</p> <p>scope [5] - 13:6, 13:15, 105:15, 106:23, 122:24</p> <p>Scoville [1] - 86:8</p> <p>SDNY [6] - 11:24, 13:12, 17:24, 22:20,</p>	<p>23:5, 98:21</p> <p>searching [1] - 55:7</p> <p>SEC [92] - 7:5, 9:1, 13:6, 16:13, 20:14, 24:13, 24:24, 26:14, 31:9, 31:14, 31:24, 32:4, 32:5, 33:13, 33:19, 33:21, 33:24, 34:21, 35:4, 35:12, 35:21, 36:1, 36:10, 37:4, 39:10, 39:20, 40:1, 41:1, 41:6, 41:18, 42:8, 42:20, 42:23, 43:19, 44:14, 44:25, 46:21, 47:2, 47:4, 47:9, 47:17, 47:20, 48:25, 50:9, 50:13, 50:16, 52:10, 53:8, 56:17, 56:21, 56:23, 57:4, 57:9, 57:14, 59:13, 60:5, 61:11, 62:1, 62:9, 62:21, 63:22, 65:10, 65:12, 66:1, 71:6, 93:20, 94:6, 94:10, 116:22, 117:21, 119:21, 121:11, 122:14, 123:6, 123:7, 123:11, 123:16, 123:20, 124:12, 124:17, 125:14, 125:17, 125:20, 126:2, 126:15, 128:17, 130:12, 131:3, 131:8, 131:11, 134:2, 137:11</p> <p>SEC's [16] - 16:6, 21:8, 31:12, 32:16, 41:11, 46:17, 47:19, 49:9, 49:11, 54:22, 58:7, 59:7, 60:9, 121:10, 129:6, 130:23</p> <p>second [6] - 51:24, 59:8, 65:16, 92:12, 94:15, 97:4</p> <p>Second [3] - 21:18, 59:19, 60:2</p> <p>secondary [42] - 21:11, 21:13, 21:17, 21:21, 22:2, 22:6, 22:8, 22:21, 23:7, 24:20, 24:23, 45:6, 45:8, 51:6, 51:15, 51:23, 52:1, 52:8, 72:9, 86:24, 88:13, 88:25, 89:4, 90:2, 91:25, 95:8, 97:16, 97:18, 97:22, 97:24, 98:5, 98:7, 98:8, 98:9, 98:14, 98:17, 99:14, 99:17, 99:20, 111:4, 111:6, 129:8</p> <p>seconds [2] - 133:2,</p>	<p>133:4</p> <p>Secrecy [1] - 61:8</p> <p>Section [18] - 40:15, 40:17, 71:22, 98:10, 98:23, 99:16, 116:8, 116:17, 116:19, 116:22, 116:24, 117:2, 117:8, 117:15, 118:7, 118:17, 118:20</p> <p>section [1] - 133:17</p> <p>sector [1] - 98:19</p> <p>securities [55] - 12:25, 13:3, 13:7, 13:8, 13:15, 13:24, 16:25, 31:19, 34:22, 34:24, 35:25, 37:5, 39:1, 41:23, 46:10, 47:10, 52:8, 54:6, 54:20, 58:24, 67:18, 70:5, 70:19, 70:25, 71:5, 76:16, 77:7, 79:13, 79:20, 82:25, 99:17, 104:20, 105:14, 106:6, 114:18, 116:18, 117:19, 118:22, 121:11, 121:16, 121:25, 122:3, 123:19, 123:21, 123:25, 128:7, 128:11, 128:20, 128:23, 130:5, 130:15</p> <p>Securities [22] - 1:3, 1:15, 1:18, 3:2, 3:9, 5:12, 33:20, 33:21, 35:1, 71:22, 98:10, 98:23, 99:16, 116:8, 116:17, 116:19, 116:22, 116:23, 117:15, 118:7, 118:16, 118:20</p> <p>security [52] - 13:4, 13:9, 16:24, 17:13, 17:22, 19:2, 31:16, 31:25, 32:6, 48:2, 48:8, 48:12, 51:16, 52:7, 52:15, 52:16, 54:14, 54:20, 57:5, 59:21, 66:3, 66:7, 66:25, 70:11, 72:2, 79:21, 80:17, 80:24, 84:4, 84:8, 89:13, 89:15, 89:21, 90:3, 91:15, 94:4, 100:3, 100:16, 104:21, 105:3, 106:12, 106:13, 107:13, 113:10, 114:18, 118:21, 126:8, 126:15, 128:21, 131:11, 131:15, 135:17</p> <p>see [16] - 32:1, 44:19, 47:15, 47:16, 54:17,</p>
S			
sale [33] - 11:2, 15:6,			

54:18, 54:19, 55:2,
55:3, 55:6, 74:7, 84:6,
131:14
seek [2] - 42:24, 43:13
seeking [4] - 37:10,
39:1, 39:3, 41:4
seem [7] - 7:23, 10:13,
47:11, 55:24, 79:24,
107:9, 125:11
seizing [1] - 95:23
selection [1] - 136:12
self [1] - 49:8
self-certified [1] - 49:8
sell [12] - 18:5, 31:21,
40:23, 51:3, 51:22,
52:19, 53:21, 69:3,
89:1, 96:8, 106:1,
111:9
seller [9] - 16:22, 21:6,
22:22, 23:11, 25:17,
27:16, 54:7, 78:19
sellers [2] - 45:11,
68:14
selling [9] - 20:24,
25:7, 28:6, 52:2, 54:1,
72:10, 107:22, 113:21,
134:3
sells [4] - 16:14,
16:21, 17:11, 92:8
sense [8] - 25:24,
30:18, 36:14, 58:9,
84:9, 117:7, 120:22
sentences [1] - 126:11
separate [9] - 19:25,
33:11, 65:5, 78:18,
84:6, 94:21, 96:7,
118:7, 132:19
separated [1] - 114:23
separately [4] - 16:3,
16:5, 58:14, 128:12
service [10] - 5:25,
73:8, 73:10, 73:12,
73:17, 73:19, 134:11,
136:21, 137:3, 137:5
services [5] - 30:10,
63:7, 85:7, 85:19,
118:22
set [7] - 6:3, 8:2,
31:22, 66:14, 78:24,
107:21, 137:17
settled [4] - 59:10,
59:12, 80:19, 119:21
settlement [11] - 46:2,
46:5, 46:6, 49:24,
50:11, 50:17, 113:13,
113:14, 113:18, 129:11
settlements [6] - 28:6,
28:12, 45:25, 50:10,
50:12, 50:14
several [2] - 6:10, 8:10

SG [3] - 86:9, 86:17,
87:2
share [5] - 16:16, 21:4,
51:13, 80:22
Sharp [3] - 42:8, 73:2,
137:11
shifting [1] - 137:7
short [3] - 5:3, 34:11,
62:13
shot [1] - 105:6
show [6] - 39:19,
44:10, 62:14, 77:12,
130:21, 137:8
showing [3] - 74:9,
121:14, 122:6
shown [1] - 130:3
shows [1] - 25:17
sic [1] - 58:2
side [8] - 24:12, 54:25,
57:11, 108:5, 112:24,
126:17
sides [2] - 35:13,
135:18
signatory [3] - 62:15,
62:20, 62:23
significance [1] - 31:3
significant [3] - 68:8,
69:19, 111:12
significantly [1] -
90:17
similar [10] - 23:2,
23:17, 27:14, 82:20,
86:21, 90:24, 95:1,
108:15, 120:9, 132:3
simple [3] - 21:8, 26:5,
102:18
Simple [3] - 27:5,
103:17, 117:10
simply [21] - 9:12,
21:5, 27:2, 27:15, 36:6,
36:23, 38:23, 39:6,
39:18, 39:22, 41:8,
42:13, 66:7, 66:18,
72:18, 76:5, 87:24,
93:4, 96:21, 129:16,
129:21
simultaneously [2] -
35:15, 36:3
single [6] - 9:22,
31:19, 31:24, 91:11,
135:16
sitting [1] - 125:3
situation [6] - 76:16,
76:17, 90:25, 92:11,
121:21
situations [1] - 53:14
six [2] - 61:12, 128:14
six-month [1] - 128:14
Sixth [1] - 64:12
sixty [1] - 133:4

skip [1] - 22:6
skipped [2] - 136:4
sky [3] - 5:12, 8:5,
8:24
slide [1] - 107:17
slip [1] - 107:17
slip-slide [1] - 107:17
slow [3] - 8:15, 8:17,
136:24
Slow [1] - 26:16
smart [2] - 25:24,
124:17
smoke [1] - 55:20
so-called [1] - 67:4
social [3] - 63:3, 82:5,
112:6
sold [37] - 16:18,
16:21, 19:4, 21:23,
21:25, 24:25, 27:12,
33:17, 47:14, 52:7,
52:20, 66:15, 66:21,
67:2, 67:10, 67:21,
70:4, 72:1, 72:4, 78:23,
83:7, 84:4, 84:11,
89:12, 98:17, 100:6,
102:11, 102:14, 105:3,
106:10, 106:13,
107:10, 110:3, 110:10,
117:10, 126:7, 129:21
sole [4] - 87:13, 87:14,
103:13, 104:8
solely [8] - 35:25,
73:16, 76:20, 87:9,
93:13, 102:24, 108:24,
108:25
solicit [2] - 63:4,
123:15
solicitation [3] -
62:11, 63:1, 105:10
solicited [1] - 123:12
Solomon [2] - 1:14,
3:13
solution [1] - 107:3
someone [8] - 31:13,
54:23, 68:1, 71:4, 73:1,
92:8, 93:5, 123:15
sometimes [2] - 11:9,
121:3
somewhat [2] - 78:14,
108:4
sophisticated [2] -
25:10, 77:19
Sorry [1] - 8:15
sorry [5] - 24:21, 28:3,
43:23, 98:12, 133:1
sort [11] - 5:15, 10:7,
39:23, 41:7, 43:9,
51:13, 75:8, 76:25,
82:12, 129:17, 130:3
sought [1] - 58:19

source [2] - 31:5,
75:24
Southern [7] - 7:23,
10:1, 10:12, 21:19,
25:6, 96:10, 137:1
space [3] - 36:7, 47:2,
88:2
speaking [3] - 3:5,
3:18, 3:24
specific [15] - 26:25,
27:21, 40:1, 42:2,
44:10, 63:5, 63:13,
64:1, 64:7, 64:18,
78:23, 80:25, 85:10,
117:11, 121:18
specifically [23] -
7:11, 7:14, 8:4, 11:11,
15:2, 41:1, 41:18,
71:23, 73:9, 84:13,
91:9, 95:21, 97:23,
112:10, 113:17,
116:15, 123:24,
129:10, 131:24, 135:2,
136:2, 136:7, 137:2
specificity [1] - 121:3
speech [3] - 6:23,
12:9, 12:11
spend [1] - 133:2
spent [2] - 54:24,
123:1
split [3] - 21:20, 23:4,
74:18
spoken [1] - 59:11
spot [3] - 49:17, 49:18,
52:25
square [2] - 12:11,
117:3
stable [1] - 24:17
stablecoin [3] - 66:23,
67:4, 100:15
staffed [1] - 88:5
stage [7] - 20:8, 75:19,
77:13, 85:18, 87:7,
116:13, 137:8
staggering [1] - 75:13
stake [3] - 33:7, 79:7,
133:23
staked [4] - 82:24,
83:10, 84:5, 136:1
staking [21] - 45:1,
83:2, 83:4, 83:7, 83:20,
83:23, 84:3, 84:6,
103:19, 104:3, 133:2,
133:6, 133:16, 133:17,
135:1, 135:5, 135:16,
135:18, 135:19,
135:22, 136:2
stall [1] - 17:10
stand [2] - 50:6, 125:7
standalone [1] - 67:9

<p>standard [5] - 6:3, 54:18, 77:13, 81:2, 121:20</p> <p>standardized [1] - 80:18</p> <p>standing [3] - 56:1, 64:13, 66:6</p> <p>start [14] - 4:7, 4:10, 4:13, 4:21, 5:7, 34:16, 34:23, 72:23, 73:25, 91:17, 109:21, 109:24, 115:20, 134:10</p> <p>started [7] - 34:15, 57:23, 66:1, 90:7, 123:11, 125:12, 134:2</p> <p>starting [2] - 3:5, 6:1</p> <p>state [3] - 5:12, 8:5, 105:10</p> <p>statement [7] - 57:17, 63:14, 74:7, 75:23, 75:24, 104:23, 125:21</p> <p>statements [18] - 17:5, 47:23, 70:17, 77:10, 78:22, 82:5, 82:8, 84:14, 85:22, 88:17, 96:2, 105:21, 112:2, 112:6, 118:12, 123:8, 128:17, 128:23</p> <p>States [25] - 2:10, 32:25, 39:4, 39:11, 39:13, 39:14, 39:24, 40:3, 41:16, 41:17, 41:19, 42:1, 42:15, 61:3, 61:19, 72:24, 73:2, 73:8, 73:20, 73:23, 115:18, 116:5, 116:18, 121:7, 134:11</p> <p>STATES [2] - 1:1, 1:11</p> <p>static [1] - 14:5</p> <p>statute [22] - 7:2, 7:3, 9:9, 12:16, 13:1, 13:10, 19:10, 38:21, 39:9, 40:24, 72:22, 80:24, 116:11, 122:17, 122:24, 123:22, 129:24, 134:2, 134:5, 134:9, 134:19, 137:6</p> <p>statutes [2] - 40:13, 80:17</p> <p>statutory [9] - 5:13, 9:20, 10:6, 33:20, 38:24, 40:1, 43:5, 58:23, 61:7</p> <p>stay [2] - 119:10, 119:15</p> <p>stenographic [1] - 138:6</p> <p>step [4] - 117:6, 117:7</p> <p>stepping [1] - 121:4</p> <p>stick [1] - 75:17</p>	<p>still [15] - 21:16, 35:10, 40:10, 53:19, 60:14, 61:1, 61:5, 67:20, 87:8, 89:21, 91:14, 92:1, 93:6, 134:3</p> <p>stilt [1] - 61:4</p> <p>stock [6] - 52:11, 92:1, 92:2, 92:3, 131:4</p> <p>stocks [2] - 54:18, 80:18</p> <p>stood [1] - 57:6</p> <p>stop [1] - 81:7</p> <p>stopping [1] - 35:19</p> <p>stops [1] - 44:11</p> <p>strategic [3] - 50:7, 50:8, 82:21</p> <p>strategically [1] - 82:17</p> <p>strategy [3] - 63:9, 83:23, 95:7</p> <p>Straub [1] - 73:3</p> <p>strawmen [1] - 121:19</p> <p>Street [3] - 1:16, 1:19, 2:7</p> <p>strength [1] - 18:13</p> <p>strengthen [1] - 18:14</p> <p>stress [1] - 75:10</p> <p>stressed [1] - 75:13</p> <p>stretch [1] - 31:12</p> <p>strict [4] - 74:4, 74:12, 74:16, 75:25</p> <p>strong [1] - 64:19</p> <p>strong-arming [1] - 64:19</p> <p>stronger [1] - 17:8</p> <p>strongly [2] - 7:21, 90:4</p> <p>structure [3] - 93:8, 95:8, 110:19</p> <p>structured [1] - 111:12</p> <p>stuff [1] - 17:4</p> <p>subject [19] - 11:1, 38:9, 38:15, 38:19, 41:23, 42:22, 56:5, 56:11, 56:15, 66:11, 73:16, 93:22, 98:10, 114:12, 115:16, 115:20, 122:7, 123:19, 137:4</p> <p>submissions [1] - 4:8</p> <p>submit [14] - 10:20, 20:9, 21:7, 23:15, 26:13, 27:17, 29:15, 31:8, 42:13, 97:14, 99:17, 121:4, 129:14, 135:13</p> <p>submitted [1] - 114:15</p> <p>subsequent [1] - 97:23</p> <p>substantive [1] -</p>	<p>115:23</p> <p>succeed [1] - 16:17</p> <p>succeeds [1] - 16:18</p> <p>success [4] - 72:6, 75:1, 112:7, 112:9</p> <p>successful [1] - 17:12</p> <p>sudden [1] - 108:7</p> <p>sued [1] - 36:2</p> <p>suffice [2] - 30:10, 61:23</p> <p>sufficient [8] - 51:7, 53:9, 58:6, 64:13, 76:12, 99:22, 105:9, 129:11</p> <p>suggest [2] - 11:24, 43:9</p> <p>suggested [4] - 6:24, 89:23, 126:20, 128:17</p> <p>suggesting [3] - 32:24, 75:19, 89:11</p> <p>suggestion [1] - 122:17</p> <p>Suite [3] - 1:23, 2:3, 2:7</p> <p>Sullivan [1] - 137:2</p> <p>summary [2] - 87:7, 135:15</p> <p>superior [1] - 21:15</p> <p>supervised [1] - 125:25</p> <p>supplement [1] - 63:20</p> <p>supplemental [1] - 87:6</p> <p>supply [6] - 14:12, 82:12, 82:13, 87:21, 87:24, 111:11</p> <p>support [11] - 8:24, 11:10, 23:15, 29:7, 29:8, 62:14, 63:5, 74:13, 76:25, 92:7, 137:10</p> <p>supported [1] - 16:7</p> <p>supporting [3] - 37:24, 38:6, 84:15</p> <p>supports [1] - 7:22</p> <p>supposed [7] - 6:14, 16:8, 39:20, 53:11, 78:19, 108:13, 125:22</p> <p>Supreme [19] - 5:18, 6:19, 7:6, 7:8, 7:11, 7:16, 9:2, 9:22, 10:10, 12:23, 26:23, 33:8, 39:7, 39:18, 39:24, 74:22, 74:23, 116:10, 132:5</p> <p>surprised [1] - 50:9</p> <p>surround [3] - 92:10, 93:24, 137:18</p> <p>surrounding [8] - 8:3,</p>	<p>21:16, 31:23, 66:14, 89:16, 105:20, 110:8, 126:7</p> <p>survive [1] - 116:6</p> <p>suspect [1] - 15:4</p> <p>sustain [2] - 55:19, 82:9</p>
T			
<p>table [5] - 3:10, 3:13, 3:19, 3:24, 40:19</p> <p>talks [7] - 55:11, 74:11, 76:1, 86:15, 91:11, 118:3, 133:12</p> <p>targeted [1] - 5:3</p> <p>teach [1] - 63:22</p> <p>team [2] - 95:7, 112:3</p> <p>Teamsters [2] - 26:24, 130:16</p> <p>technology [12] - 67:24, 68:10, 68:17, 68:25, 75:3, 83:24, 87:17, 109:13, 110:5, 110:6, 135:23, 136:10</p> <p>Telegram [15] - 7:24, 10:3, 10:11, 21:11, 35:2, 46:23, 66:13, 74:11, 81:9, 90:23, 91:6, 94:7, 114:16, 126:1, 126:11</p> <p>ten [4] - 42:22, 50:13, 54:24, 65:9</p> <p>ten-minute [1] - 65:9</p> <p>tend [1] - 11:15</p> <p>Tenreiro [2] - 1:17, 3:9</p> <p>TENREIRO [5] - 3:8, 126:19, 127:5, 127:8, 127:12</p> <p>tentacles [1] - 61:2</p> <p>Tenth [3] - 8:14, 8:19, 86:8</p> <p>term [9] - 8:2, 9:11, 53:8, 53:12, 67:4, 81:3, 81:4, 81:5, 81:7</p> <p>terminomics [1] - 78:7</p> <p>terms [17] - 8:20, 8:23, 11:12, 21:11, 23:2, 28:24, 54:13, 54:14, 68:17, 79:21, 80:17, 80:22, 81:16, 87:3, 87:17, 88:14, 105:19</p> <p>Terraform [8] - 22:25, 23:7, 49:14, 87:6, 98:14, 99:18, 100:14, 114:24</p> <p>terrific [1] - 4:13</p> <p>terrorist [1] - 113:9</p> <p>test [25] - 13:23, 19:14, 25:4, 39:17,</p>			

39:20, 40:12, 40:18,
44:10, 51:8, 67:5, 74:1,
74:9, 76:10, 77:24,
90:23, 92:4, 101:4,
109:6, 110:16, 116:9,
117:4, 117:6, 120:12,
128:25, 136:13

testimony ^[1] - 98:1

tests ^[9] - 74:18,

74:23, 74:25, 75:15,
76:6, 76:8, 76:14, 97:9,
118:3

Tether ^[1] - 49:23

text ^[3] - 5:13, 10:6,
81:3

textual ^[1] - 80:12

THE ^[262] - 1:1, 1:1,

1:10, 3:1, 3:14, 3:15,
3:21, 4:1, 4:6, 5:9, 6:5,
6:7, 6:13, 7:23, 9:8,
10:11, 11:6, 11:13,
12:2, 12:10, 13:14,
13:19, 14:5, 14:8,
14:11, 14:22, 14:25,
15:7, 15:13, 15:19,
16:3, 17:2, 17:16,
18:12, 18:23, 19:12,
19:18, 20:5, 20:11,
20:13, 20:21, 20:25,
21:10, 22:6, 22:13,
22:23, 24:10, 24:21,
25:5, 25:23, 26:11,
26:16, 26:19, 27:8,
27:21, 28:1, 28:15,
28:21, 29:4, 29:13,
29:16, 30:4, 30:7,
30:13, 30:20, 30:23,
31:17, 32:8, 32:22,
33:15, 34:3, 34:5,
34:11, 34:13, 34:15,
35:17, 36:8, 37:1,
37:13, 37:22, 38:7,
38:15, 38:20, 38:25,
40:4, 40:20, 41:10,
42:2, 42:16, 43:8,
43:22, 43:24, 44:15,
44:19, 44:22, 45:19,
46:8, 47:9, 47:25, 48:4,
48:8, 48:10, 48:19,
49:11, 50:1, 50:18,
51:15, 51:20, 52:4,
52:14, 52:18, 53:11,
53:19, 54:5, 55:10,
55:23, 56:7, 56:17,
56:22, 57:24, 58:17,
60:4, 60:10, 60:22,
61:14, 64:4, 64:9,
64:24, 65:7, 65:12,
65:15, 65:22, 66:5,
66:10, 66:22, 67:8,

67:16, 68:13, 69:2,
69:11, 69:25, 70:7,
70:12, 70:16, 70:23,
71:3, 71:10, 71:14,
71:17, 72:9, 73:24,
74:7, 75:17, 75:22,
76:15, 77:17, 78:1,
78:13, 79:5, 81:8, 82:3,
82:7, 82:23, 83:5, 83:9,
84:2, 84:17, 84:22,
85:12, 85:21, 87:5,
88:3, 88:9, 89:7, 90:1,
90:6, 91:5, 91:24,
93:19, 94:14, 95:13,
96:9, 97:4, 97:15,
97:19, 99:1, 99:5, 99:8,
99:21, 100:23, 101:13,
101:21, 102:3, 102:13,
102:18, 103:9, 103:24,
104:3, 104:12, 105:17,
106:11, 107:4, 107:16,
109:16, 109:20,
111:16, 112:12,
112:15, 113:21, 114:1,
114:9, 115:1, 115:7,
115:15, 115:25, 116:4,
117:20, 118:10,
118:14, 118:18,
118:23, 119:2, 119:6,
119:9, 119:15, 119:19,
119:23, 120:7, 122:9,
122:14, 125:5, 126:5,
126:13, 126:16,
126:23, 127:6, 127:11,
127:13, 128:19,
129:24, 130:8, 130:11,
131:18, 132:24, 133:4,
133:7, 133:19, 134:1,
134:8, 134:13, 134:16,
134:20, 134:23, 135:4,
135:14, 135:24, 136:4,
136:15, 136:20,
136:23, 137:12, 137:14
themes ^[1] - 75:15
themselves ^[8] - 3:6,
30:10, 44:1, 46:22,
51:7, 53:21, 66:12,
96:7

theory ^[13] - 7:24,

13:21, 41:11, 41:20,
43:10, 43:15, 46:17,
49:1, 59:7, 59:13, 74:3,
88:11, 129:7

thereafter ^[1] - 40:24

therefore ^[3] - 49:2,

72:1, 106:13

thereupon ^[1] - 77:15

they've ^[5] - 41:8,
42:21, 73:4, 111:24,
112:1

thinking ^[2] - 124:14,
124:18

third ^[18] - 23:17, 24:3,
27:9, 27:13, 27:18,
51:10, 59:15, 76:19,
76:21, 78:8, 87:8,
88:18, 90:15, 95:13,
96:22, 104:13, 106:17

third-party ^[9] - 23:17,
27:9, 27:13, 27:18,
51:10, 78:8, 88:18,
96:22, 104:13

thorough ^[1] - 26:2

thought-through ^[1] -
26:2

thousands ^[1] -

128:24

thread ^[1] - 59:17

three ^[12] - 5:20, 6:17,
13:23, 19:18, 46:4,
50:12, 61:5, 62:21,
69:12, 74:6, 110:25,
130:21

three-part ^[1] - 13:23

throughout ^[2] - 37:8,
96:13

thrust ^[1] - 20:19

tie ^[2] - 68:24, 88:11

tied ^[7] - 19:5, 64:18,
69:21, 93:9, 99:25,
102:8, 102:15

tight ^[1] - 39:19

time-barred ^[4] -

20:10, 29:9, 71:14,
134:7

timed ^[1] - 50:6

timing ^[3] - 61:10,

61:21

tip ^[1] - 107:7

today ^[4] - 3:18, 4:20,
38:1, 99:9

together ^[4] - 18:6,
68:3, 94:20, 110:21

token ^[37] - 36:14,

48:11, 48:14, 48:15,
48:16, 51:9, 52:10,
66:2, 68:1, 68:2, 72:5,
72:7, 84:25, 88:22,
91:1, 92:14, 92:20,
93:3, 93:18, 93:20,
94:16, 95:24, 97:11,
97:13, 100:2, 100:21,
100:22, 101:12, 107:4,
108:24, 111:9, 114:10,
128:24

tokenized ^[1] - 34:1

tokens ^[37] - 22:21,
23:17, 27:9, 27:14,
34:22, 35:11, 35:13,
35:24, 37:5, 41:3, 66:6,

67:13, 68:21, 69:18,
69:19, 69:22, 71:1,
75:5, 77:5, 78:9, 78:11,
88:1, 88:16, 88:18,
89:1, 89:5, 93:15,
96:22, 96:25, 98:22,
105:12, 107:1, 109:2,
109:9, 110:24, 111:13,
112:1

took ^[6] - 29:16, 50:20,
71:6, 82:10, 90:3,
125:16

top ^[2] - 58:5, 68:7

Topps ^[1] - 18:19

totality ^[11] - 19:3,

66:12, 66:20, 79:1,
81:9, 84:10, 89:16,
91:12, 93:24, 105:19,
108:22

touch ^[2] - 24:11, 73:3

touched ^[1] - 27:10

touching ^[1] - 124:24

tout ^[1] - 53:4

touted ^[1] - 91:16

touting ^[6] - 18:13,

18:17, 21:15, 72:6,
91:14, 112:2

touts ^[1] - 82:18

traced ^[1] - 73:4

trade ^[2] - 18:8

traded ^[3] - 64:20,
105:14, 128:14

trades ^[2] - 45:8,

128:12

Trading ^[4] - 48:24,

70:13, 112:22, 119:5

trading ^[10] - 31:1,

45:1, 45:15, 47:8, 49:5,
54:1, 54:2, 107:23,
122:2

transaction ^[11] -

5:20, 5:21, 6:7, 8:3,
31:22, 31:23, 39:17,
40:12, 57:20, 58:14,
117:4

transactional ^[2] -

40:14, 40:18

transactions ^[22] -

6:8, 12:18, 18:6, 35:24,
40:15, 43:20, 45:7,
45:8, 48:17, 49:18,
49:19, 51:7, 51:15,
52:9, 53:18, 56:4,
58:12, 58:15, 116:25,
118:3, 129:18

transcript ^[2] - 138:5,

138:6

TRANSCRIPT ^[1] - 1:9

transfer ^[3] - 24:7,

26:22, 128:21

<p>transferable ^[1] - 80:22</p> <p>transferred ^[1] - 26:23</p> <p>transform ^[2] - 53:9, 58:6</p> <p>treated ^[1] - 82:20</p> <p>trials ^[1] - 104:17</p> <p>tried ^[2] - 35:21, 124:6</p> <p>trillion ^[3] - 29:22, 30:25, 31:1</p> <p>trillions ^[1] - 33:6</p> <p>TRO ^[4] - 4:16, 104:19, 107:21, 124:9</p> <p>true ^[10] - 11:14, 14:4, 17:17, 29:12, 77:15, 78:18, 94:2, 128:21, 138:5, 138:6</p> <p>truisms ^[1] - 11:10</p> <p>trust ^[2] - 45:15, 101:9</p> <p>try ^[2] - 22:5, 123:4</p> <p>trying ^[7] - 20:3, 87:22, 96:7, 102:4, 107:12, 122:16, 123:15</p> <p>turn ^[6] - 22:5, 34:7, 42:18, 70:10, 106:21, 114:7</p> <p>turns ^[1] - 115:5</p> <p>twice ^[1] - 59:19</p> <p>Twitter ^[1] - 63:6</p> <p>two ^[26] - 6:17, 7:1, 13:16, 22:19, 26:8, 26:13, 45:2, 46:15, 49:15, 53:6, 57:6, 57:13, 62:6, 64:2, 64:21, 73:3, 89:19, 89:20, 98:19, 112:24, 117:6, 117:7, 118:3, 118:8, 120:23, 132:4</p> <p>two-step ^[1] - 117:6</p> <p>tying ^[1] - 90:12</p> <p>type ^[6] - 40:5, 49:17, 54:17, 58:3, 81:18, 133:22</p> <p>types ^[6] - 12:18, 52:8, 54:2, 54:16, 55:1, 58:15</p>	<p>unclear ^[1] - 32:7</p> <p>unconstitutionally ^[1] - 123:22</p> <p>under ^[25] - 5:11, 26:22, 29:23, 36:17, 36:19, 38:20, 39:6, 39:16, 44:9, 49:19, 60:18, 63:13, 81:17, 98:23, 98:24, 106:4, 114:4, 114:18, 118:14, 121:11, 121:21, 121:25, 136:14, 137:6, 137:18</p> <p>Under ^[1] - 21:3</p> <p>underlying ^[5] - 61:22, 80:3, 110:5, 114:10, 120:20</p> <p>underscore ^[1] - 4:16</p> <p>underscored ^[1] - 15:16</p> <p>underscores ^[1] - 111:16</p> <p>understandings ^[10] - 52:21, 56:24, 66:14, 78:24, 81:11, 91:9, 92:9, 93:24, 95:17, 105:22</p> <p>understood ^[5] - 15:12, 31:16, 49:18, 54:3, 54:12</p> <p>undertake ^[1] - 96:2</p> <p>undertaking ^[2] - 79:11, 96:24</p> <p>undertook ^[1] - 80:13</p> <p>undisputed ^[1] - 26:14</p> <p>undoubtedly ^[1] - 17:11</p> <p>unique ^[1] - 35:23</p> <p>UNITED ^[2] - 1:1, 1:11</p> <p>United ^[25] - 2:10, 32:25, 39:4, 39:11, 39:13, 39:14, 39:24, 40:3, 41:16, 41:17, 41:19, 42:1, 42:15, 61:3, 61:19, 72:24, 73:2, 73:8, 73:20, 73:23, 115:18, 116:5, 116:18, 121:7, 134:11</p> <p>unless ^[7] - 57:7, 57:12, 72:23, 109:15, 126:4, 127:2, 132:23</p> <p>unusually ^[1] - 121:14</p> <p>unwieldy ^[1] - 119:22</p> <p>up ^[49] - 5:1, 5:2, 10:4, 10:23, 14:8, 14:9, 14:10, 14:15, 16:18, 16:23, 24:3, 26:17, 26:25, 27:1, 31:13, 32:1, 32:8, 43:3, 43:15, 44:12, 46:21, 50:6,</p>	<p>54:10, 57:6, 59:16, 60:8, 60:13, 75:4, 76:18, 77:7, 82:14, 84:19, 85:10, 88:4, 94:20, 103:10, 106:20, 107:3, 108:1, 111:23, 116:10, 124:1, 125:7, 130:13, 130:19, 131:8, 136:11</p> <p>USD ^[2] - 49:22, 114:7</p> <p>USDT ^[2] - 100:15, 100:17</p> <p>use-case ^[1] - 109:3</p> <p>useful ^[1] - 53:5</p> <p>users ^[1] - 63:22</p> <p>uses ^[4] - 6:6, 16:14, 18:21, 87:7</p> <p>usurping ^[1] - 80:9</p>	<p>13:15, 26:24, 54:14, 54:15, 57:24, 85:5, 119:12, 124:7, 130:16</p> <p>vertical ^[5] - 74:4, 74:13, 74:20, 75:25, 76:2</p> <p>vesting ^[1] - 111:14</p> <p>viability ^[1] - 93:18</p> <p>viable ^[2] - 35:16, 36:7</p> <p>viatical ^[8] - 28:6, 28:12, 45:25, 46:1, 46:2, 46:5, 46:6, 129:11</p> <p>view ^[9] - 5:22, 23:3, 47:19, 47:22, 49:10, 49:12, 52:15, 58:17, 75:11</p> <p>viewed ^[1] - 77:15</p> <p>viewpoint ^[1] - 69:3</p> <p>vigorously ^[1] - 20:7</p> <p>Viola ^[1] - 69:21</p> <p>violated ^[2] - 39:9, 104:20</p> <p>violating ^[1] - 123:24</p> <p>violation ^[7] - 40:2, 41:8, 41:24, 43:4, 43:10, 105:16, 106:21</p> <p>violations ^[2] - 99:15, 106:23</p> <p>VIP ^[2] - 63:15, 63:21</p> <p>Virgin ^[1] - 91:2</p> <p>virtually ^[1] - 31:13</p> <p>void ^[1] - 43:18</p> <p>volume ^[2] - 31:2, 63:16</p> <p>voluntary ^[1] - 53:7</p> <p>voting ^[3] - 48:14, 51:12, 52:12</p> <p>vs ^[1] - 1:5</p>
<p>U</p>	<p>U.S ^[29] - 24:25, 38:8, 38:22, 39:2, 39:14, 44:11, 61:17, 61:18, 62:11, 62:15, 63:1, 63:4, 63:10, 70:4, 86:8, 99:25, 106:16, 111:5, 116:3, 117:10, 117:23, 117:25, 118:12, 121:16, 121:20, 121:24, 122:7, 127:21</p> <p>unable ^[1] - 32:5</p>	<p>V</p>	<p>vagaries ^[1] - 122:20</p> <p>vague ^[5] - 12:12, 39:12, 39:23, 86:1, 123:22</p> <p>validate ^[1] - 109:25</p> <p>validation ^[1] - 67:19</p> <p>validator ^[1] - 136:8</p> <p>value ^[52] - 14:1, 14:5, 14:7, 14:15, 15:2, 15:3, 15:22, 16:9, 16:19, 16:23, 17:9, 24:17, 28:19, 29:8, 31:14, 53:3, 54:9, 55:19, 66:24, 68:20, 69:22, 77:6, 78:17, 82:9, 83:11, 83:13, 84:14, 84:19, 87:11, 87:19, 90:12, 91:22, 93:9, 93:12, 93:13, 94:11, 94:20, 96:25, 103:7, 103:9, 110:5, 110:6, 110:12, 111:2, 111:7, 111:10, 112:1, 128:13</p> <p>valued ^[1] - 99:25</p> <p>values ^[1] - 68:2</p> <p>variable ^[3] - 9:13, 80:20, 104:9</p> <p>varies ^[1] - 103:12</p> <p>variety ^[5] - 67:14, 76:6, 76:14, 103:6, 103:18</p> <p>various ^[4] - 59:2, 80:16, 89:5, 112:2</p> <p>Vault ^[1] - 117:10</p> <p>vault ^[4] - 26:6, 27:5, 102:19, 135:19</p> <p>vaults ^[1] - 103:23</p> <p>version ^[1] - 110:25</p> <p>versus ^[11] - 3:3, 9:1,</p>
			<p>W</p>
			<p>waiting ^[2] - 43:18, 44:14</p> <p>walk ^[2] - 123:5, 136:17</p> <p>wants ^[2] - 17:12, 18:19</p> <p>warned ^[1] - 39:25</p> <p>warning ^[1] - 105:6</p> <p>warrantee ^[1] - 5:25</p> <p>wary ^[1] - 39:25</p> <p>wash ^[2] - 49:24, 59:13</p> <p>Washington ^[7] - 1:6, 1:16, 1:23, 2:4, 2:7, 2:11, 138:14</p> <p>wasting ^[1] - 15:9</p> <p>water ^[1] - 22:12</p> <p>Watkins ^[3] - 2:6, 4:3,</p>

<p>4:5 ways [4] - 39:21, 107:18, 117:22, 124:16 web [1] - 112:6 week [1] - 50:1 weekend [1] - 51:11 weeks [1] - 53:6 weight [2] - 64:10, 132:6 Weinstein [2] - 57:24, 58:10 well-settled [1] - 80:19 whereas [1] - 27:1 whiskey [1] - 86:19 white [4] - 17:4, 25:11, 78:6, 82:5 whole [4] - 12:14, 111:16, 115:17, 119:12 widely [3] - 54:12, 95:19, 112:5 widespread [2] - 88:16, 88:19 William [1] - 2:6 Williamson [1] - 59:1 wish [1] - 131:6 withdrawn [3] - 26:15, 26:18, 132:8 Woodward [3] - 8:14, 8:19, 59:18 word [6] - 8:1, 9:6, 9:7, 9:9, 9:10, 127:14 words [3] - 6:6, 21:14, 67:19 world [6] - 43:18, 44:8, 44:13, 49:12, 73:11, 115:17 world's [1] - 18:25 worldwide [1] - 73:12 worth [1] - 55:15 writ [1] - 124:14 writing [2] - 127:11, 127:24 written [6] - 4:12, 4:13, 10:4, 78:16, 81:12, 81:17 wrote [2] - 63:24, 125:25</p>	<p>100:18 yielding [1] - 67:3 York [6] - 1:19, 7:24, 10:1, 21:20, 74:10, 137:1 yourself [1] - 65:16</p>
Z	
	<p>Zhao [24] - 2:5, 35:3, 38:13, 59:9, 61:9, 62:15, 62:19, 62:23, 63:3, 63:6, 63:9, 63:15, 63:23, 65:3, 68:23, 78:11, 82:18, 90:10, 90:15, 91:20, 118:24, 121:6, 127:17 Zhao's [1] - 60:18 Zhou [3] - 4:3, 62:7, 121:22 zoom [1] - 121:3 zooming [1] - 121:2</p>
Y	
<p>year [2] - 32:15, 62:2 years [8] - 36:13, 42:23, 45:24, 49:6, 54:24, 71:7, 110:25, 131:5 yield [8] - 100:18, 103:10, 103:12, 103:14, 104:4, 104:7, 115:6 yield-generating [1] -</p>	